SUPREME COURT, U. S.
FILED
JUL 3 1973

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1254

JOSEPH SMITH, SHERIFF OF WORCESTER COUNTY,
APPELLANT,

v.

VALARIE GOGUEN,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appeal Docketed on March 14, 1973

Probable Jurisdiction Noted on May 21, 1973

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COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

COMMONWEALTH

vs.

VALARIE GOGUEN

Amended Bill Of Exceptions

A complaint was brought against the defendant Valarie Goguen charging that he did publicly treat contemptuously the flag of the United States in violation of G.L. Ch. 264 s. 5. After trial and conviction in the District of Leominster the defendant made a timely appeal to the Superior Court pursuant to G.L. Ch. 278 s. 18. The complaint was tried before a district court justice sitting by designation and a jury on April 14 and 15, 1971.

The defendant filed a Motion to Dismiss the Complaint on the ground that G.L. Ch. 264 s. 5 is unconstitutional on its face and as applied to him in that it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Part I Article 12 of the Declaration of Rights in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials.

Said motion was argued at the commencement of trial and was denied by the Court. The defendant's exception was duly noted.

At the conclusion of the Commonwealth's case, the defendant filed a Motion for a Directed Verdict which, after argument, was denied by the Court. The defendant's exception was duly noted.

In presenting the defendant's case, the defendant sought to introduce evidence through his expert witness of numer-

ous advertisements in newspapers and magazines, objects of wearing apparel and other items demonstrating contemporary use and treatment of the United States flag for the purpose of assisting the jury in determining whether the defendant's treatment of the United States flag was contemptuous by contemporary standards. After hearing the defendant's offer of proof the Court sustained the Commonwealth's objections to the aforesaid evidence. The defendant's exception was duly noted.

At the close of the defendant's case the defendant filed requests for instructions to the jury. The Court declined to give instructions numbered 3 and 4 which required that the jury in order to find the defendant guilty must find that the flag alleged to have been treated contemptuously was an official flag of the United States within the meaning of, and as defined by Executive Order number 10834, issued by the President of the United States pursuant to Title 4 United States Code, chapter one, section one, and set forth the provisions of said Executive Order. The Court granted defendant's instruction number two but deleted therefrom the word "official". The defendant's exceptions were duly noted.

The jury returned a verdict of guilty and the Court sentenced the defendant to a term of six months in the House of Correction.

The pertinent evidence introduced at the trial is as follows:

Lieutenant Francis A. Arel of the Leominster Police Department testified that he was on duty on January 30, 1970. He observed the defendant Valarie Goguen standing with a group of persons on Main Street in Leominster. The defendant was wearing a short coat, blue jeans and shoes. A cloth American flag, approximately 3 x 5 or 4 x 6 inches was sewn to the blue jeans in the vicinity of the

left portion of the defendant's buttocks. Arel said that he was able to observe the flag clearly.

Lieutenant Arel further testified that he had a conversation with the defendant at that time, and that while he was questioning the defendant about the flag, the other persons present were laughing. Lieutenant Arel later obtained an arrest warrant for the defendant from the Leominster District Court and arrested the defendant when he voluntarily surrendered himself at the Police Station some three days later.

Patrolman Guido V. Barassi of the Leominster Police Department testified that he was on duty on January 30, 1970. He observed the defendant walking in the downtown business district of Leominster, wearing a short coat, casual type pants and a miniature American flag sewn on the left side of his pants.

Whitney Smith, Junior testified on behalf of the defense. His qualifications as an expert vexillologist were not challenged by the Commonwealth.

Mr. Smith testified that the present United States flag was created by altering the British flag at the time of the American revolution. He said that the flag desecration laws were passed in the late nineteenth century to protect the flag from commercial exploitation and use by politicians in their campaigns. Mr. Smith said that he was familiar with contemporary use of the United States flag and had brought with him examples of contemporary commercial and political use of the flag which the defendant offered into evidence. The defendant specifically offered to put into evidence various uses of both the actual design of the United States flag and the stars and stripes pattern as they appear in contemporary magazines, newspapers and products, among them a tie made of flag material containing the pattern of the flag, a pair of pants with a stars and stripes design, and other commercial usages of the flag as well as a hassock or footstool which has an Amer-

ican flag placed on the area where the person using it would sit down, and also a bathing suit made out of the flag design.

Mr. Smith further testified that he was familiar with the requirements for an official United States flag, that he was familiar with the manufacture of flags such as the one the defendant was alleged to have been wearing and that such flags do conform to the official standards.

The foregoing Amended Bill of Exceptions contains all of the evidence material to the questions raised by this Amended Bill of Exceptions.

The defendant being aggrieved by the Court's rulings prays that his several exceptions may be allowed.

This Amended Bill of Exceptions has been timely filed and timely notice of filing and a copy of the foregoing has been given to the Commonwealth.

By his attorneys,
EVAN T. LAWSON
C. MICHAEL MALM

Allowed: May 18, 1971 (William Garbose, D.C.J.)
FILED May 17, 1971

Complaint

TO THE DISTRICT COURT OF LEOMINSTER, in the County of Worcester, and Commonwealth of Massachusetts Francis A. Arel of Leominster in said County in behalf of the COMMONWEALTH OF MASSACHUSETTS, on oath complains that Valarie Goguen of Leominster on the thirtieth day of January, in the year of our Lord one thousand nine hundred and seventy at Leominster did publicly treat contemptuously the flag of the United States in violation of G.L. Chapter 264, Section 5 as amended.

FRANCIS A. AREL
Complainant

WORCESTER, SS.

Received and sworn to this thirty-first day of January in the year of our Lord one thousand nine hundred and seventy before said Court.

William J. Silvia
Clerk

A True Copy
(Seal)
Attest, William P. Silvia, Clerk

[Commonwealth of Massachusetts
Superior Court]
[Title Omitted in Printing]

No. 38705

Docket Entries

Offense: Pub. Treating contemptuously U.S. Flag.

Place: Leom.

Surety and amount: Robert Boudreau, 32 Monument Sq., Leom., Mass. $1,000 (B.B.) 6/16/70 See Reading #3.

Counsel: T. Mulhern, Esq., 340 Main St., Worcester, Mass. disappear 4/17/70
Haskell A. Krassler, 1 State St., Boston, Mass. 4/17/70
Evan T. Lawson 14 Beacon St., Boston, Mass. 6/4/70 3/17/71.
John M. O'Connor Asst. Dist. Atty. for Commonwealth 4/14/71
Justice disposing of case: William Garbose, DCJ.

1970

Mar. 2	1	Appeal filed
Apr. 27		No professional Bondsman (Chmielinskim J.)
June 4	2	Deft's Motion to dismiss, filed. Retain same bail (Barry, D.C.J.)
June 16	3	Order admitting petitioner to bail on personal recogs. dated June 12, 1970. Law #71318 (Spalding, J., S.J.C.)
Apr. 14		Plea—Not Guilty

1971			
Apr.	14	4	Deft. asked Permission to have stenographer at its own expense present at this hearing which court allowed Stenog. (Garbose, D.C.J.) Stenog. Geraldine Geannandrea deft's choice.
	14		Motion #2-after hearing, motion denied and defendant's exception noted (Garbose, DCJ).
1971			
	15	5	Defendant's Motion for a Directed Verdict filed and after hearing denied; Deft's. exceptions noted (Garbose, D.C.J.) Counsel present. Verdict - Guilty. Sentence 6 months House of Correction; no credit (Chap. 279, S33a). Mittimus issued.
	28	6	*ORDER* staying execution of sentence and admitting petitioner to Bail by surety Bond dated April 23, 1971 (Spiegel, J., S.J.C.) (Law #72126).
May	5	7	Bill of Exceptions.
	6		Bill of Exceptions presented (Garbose, D.C.J.) notified Dist. Atty.
	7		Hearing set on Bill of Exceptions on Friday, May 14, 1971 at 10:00 A.M. (Garbose, J.) notified District Attorney and Atty. Evan T. Lawson by Asst. Clerk P. Breen.
	14		After hearing before Garbose, D.C.J. Amended Bill of Exceptions to be filed. Counsel present.

1971

17 8 **Amended Bill of Exceptions.**
18 **Amended Bill of Exceptions allowed (Garbose, D.C.J.)**
Notices mailed 6/3/71.

A Copy,
Attest:
(s) JAMES J. JOYCE
Clerk.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
No. 14,933

WORCESTER COUNTY JANUARY SITTING, 1972

COMMONWEALTH

v.

VALARIE GOGUEN

DEFENDANT'S BRIEF

STATEMENT OF THE CASE

A complaint was brought against the defendant, Valarie Goguen (Goguen), in the District Court of Leominister charging that he "did publicly treat contemptuously the flag of the United States" in violation of G.L. Ch. 264 §5 (R. 1, 4). After trial in the District Court Goguen was convicted and appealed to the Worcester County Superior Court (R. 1).

In the Superior Court Goguen filed a Motion to Dismiss the Complaint on the grounds that G.L. Ch. 264 §5 is unconstitutional on its face and as applied to him in that it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Part I, Article 12, of the Declaration of Rights in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials (R. 1). The Motion to Dismiss the Complaint was denied, to which Goguen took exception (R. 2).

On April 14 and 15 trial was had before a district court justice sitting by designation and a jury (R. 1).

A summary of the material evidence introduced by the Commonwealth is as follows:

On January 30, 1970, a Leominister Police officer observed Goguen walking in the business district of Leominister, wearing a short coat and casual type pants. Sewn to the left side of Goguen's pants was a miniature American flag (R. 3).

On the same day, another Leominster police officer observed Goguen standing with a group of persons on Main Street in Leominster (R. 2, 3). Goguen was wearing a short coat, blue jeans and shoes. The officer was able to observe a cloth American flag, approximately 3 x 5 or 4 x 6 inches sewn to blue jeans in the area of the left portion of Goguen's buttocks. While the officer questioned Goguen concerning the flag, the other persons present were laughing (R. 3).

At the close of the Commonwealth's case, Goguen filed a Motion for a Directed Verdict which was denied, to which Goguen took exception (R. 2).

A summary of the material evidence introduced by the defendant is as follows:

A professional vexillologist was qualified as an expert and testified that the present United States flag was created by altering the British flag at the time of the American revolution. He said that the flag desecration laws were passed in the late ninteenth century to protect the flag from commercial exploitation and use by politicians in their campaigns. The vexillologist further testified that flags such as the one the defendant was wearing do not conform to the official standards as set forth in Executive Order number 10834, pursuant to Title 4 United States Code, Chapter one, section one (R. 3, 4).

Goguen sought to introduce, through his expert, evidence of advertisements in newspapers and magazines, objects of wearing apparel and other items demonstrating

contemporary use and treatment of the United States flag for the purpose of assisting the jury in determining whether the defendant's treatment of the United States flag was contemptuous by contemporary standards (R. 2). The Commonwealth objected and the defendant offered to put into evidence various uses of both the actual design of the United States flag and the stars and stripes pattern as they appear in contemporary magazines, newspapers and products, among them a tie made of flag material containing the pattern of the flag, a pair of pants with a stars and stripes design, a hassock or footstool with an American flag placed on the area where the person using it would sit down and a bathing suit made out of the flag design (R. 3, 4).

The Court sustained the Commonwealth's objection to which the defendant took exception (R. 2).

The Defendant filed requests for instructions to the jury. The Court declined to give instructions numbered 3 and 4 which required that the jury, in order to find the defendant guilty, must find that the flag alleged to have been treated contemptuously was an official flag of the United States within the meaning of, and as defined by Executive Order number 10834, issued by the President of the United States pursuant to title 4 United States Code, chapter one, section one, to which the defendant took exception (R. 2).

The jury returned a verdict of guilty and the Court sentenced Goguen to a term of six months in the House of Correction.

SUMMARY OF ARGUMENT

General Laws Ch. 264 §5 on its face infringes upon the defendant's right to freedom of speech as guaranteed by the First Amendment of the United States Constitution. (Pages 6-7) The conduct of the defendant in the

present case was symbolic speech protected by the First Amendment of the Constitution. (Pages 7-15)

General Laws Ch. 264 §5 violates on its face the due process clause of the Fourteenth Amendment of the United States Constitution in that it is overly broad and brings within its ambit constitutionally protected activity. (Pages 15-21)

The Commonwealth failed to prove its case against the defendant by its failure to prove the required element of intent. (Pages 21-23)

The decision of the lower court in convicting the defendant should be reversed because the defendant did not treat contemptuously a "flag of the United States." (Pages 23-24)

The trial Judge committed reversible error by failing to allow defendant to introduce through his expert examples of contemporary flag usage. (Page 25)

ARGUMENT

A. G.L. Ch. 264 §5 on its Face and as Applied in the Instant Case Unconstitutionally Infringes Upon the Defendant's Right to Freedom of Speech.

1. *G.L. Ch. 264 §5 is unconstitutional on its face.*

The complaint charges that Goguen "did publicly treat contemptuously the flag of the United States in violation of G.L. Ch. 264 §5." (R. 1).

That statute provides in pertinent part that:

> Whoever publicly . . . treats contemptuously the flag of the United States . . . whether such flag is public or private property . . . shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both.

G.L. Ch. 264 §5 is on its face an unconstitutional restraint upon the right of freedom of speech guaranteed by the First Amendment to the United States Constitution.

It can not be disputed that the primary thrust of the First Amendment is to guarantee and protect the right to express views, however unorthodox or unpopular, about politics, nationalism and religion. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). Furthermore, the right to speak freely on political matters has been held to apply to the expression of opinion concerning the nation's flag.

> We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, *including those opinions which are defiant or contemptuous.* (*Street* v. *New York,* 394 U.S. 576, 593 (1969), emphasis added).

In *Street* the Court was faced with a New York statute which was for all practical purposes similar to G.L. Ch. 264 §5. It provided that it was a misdemeanor:

> (to) publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act (any flag of the United States) (*Street* v. *New York, supra,* at 578.)

Upon learning that James Meredith had been shot, Street went to an intersection and burned his United States flag, saying "We don't need no damn flag." *Id.* p. 578-579. The Court held that Street could not be convicted for his words which cast contempt upon the flag:

> Since appellant could not constitutionally be punished under §1425, subd. 16, par. d, for his speech, and since we have found that he may have been so punished, his conviction cannot be permitted to stand. (*Id.* at 594).

G.L. Ch. 264 §5 purports by its general language to punish the mere verbal expression of ideas and thus

clearly contradicts the constitutionally protected right to freedom of speech guaranteed by the First Amendment. The statute should therefore be declared unconstitutional and Goguen's conviction should be reversed.

2. *The Defendant's conduct was constitutionally protected symbolic speech.*

The specific conduct for which Goguen was convicted was publicly wearing a patch representing the flag of the United States on the seat of his pants. Such conduct on the part of the defendant clearly expressed an idea, albeit unpopular or unpatriotic, about the flag or about the country it symbolizes. It can not be denied that such conduct is properly classified as symbolic speech. Indeed, certain courts have gone so far as to take judicial notice of the symbolic significance of the American flag. *Hodsdon* v. *Buckson,* 310 F. Supp. 528, 533 (D. Del. 1970), while others point out that it is "self-evident that most, if not all, conduct associated with the United States flag is symbolic speech." *Crosson* v. *Silver,* 319 F. Supp. 1084, 1086 (D. Ariz. 1970). Goguen may have meant to show that he believed that America was a fit place only to sit on, or the proximity to that portion of his anatomy might have had more vulgar connotations. Nonetheless, the strong and forceful communication of ideas is unmistakable. While it is recognized that not all conduct which also serves to express ideas is constitutionally protected symbolic speech, see *United States* v. *O'Brien,* 391 U.S. 367 (1968), it is submitted that the conduct in the case at bar is so closely related to the direct expression of ideas that it should be treated as "pure speech" and thus be subject to First Amendment protection.

When conduct which communicates ideas is also constitutionally protected speech is a difficult question. The United States Supreme Court has not passed upon the specific question of whether conduct related to the United

States flag can be characterized as constitutionally protected symbolic speech. Each case which has come before the Court in this area has either been decided upon other grounds (See, *Anderson* v. *Georgia*, 390 U.S. 206 (1968), *Street* v. *New York*, 394 U.S. 576 (1969) and *Cowgill* v. *California*, 396 U.S. 371 (1970)) or left undecided by an equally divided Court. See *Radich* v. *New York*, 39 U.S. L.W. 3422 (March 24, 1971).

However, the Court has held that wearing black arm bands is constitutionally protected symbolic speech. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Similarly, the display of a red flag as a symbol of opposition to organized government, *Stromberg* v. *California*, 283 U.S. 359 (1931), and wearing a military uniform in a protest play, *Schacht* v. *United States*, 398 U.S. 58 (1970), have been found to be protected.

The greatest difficulty arises in delineating between conduct which is clearly and solely the expression of ideas (e.g. wearing arm bands) and conduct which while expressing ideas may also be such that the state has a legitimate interest in controlling it. In *United States* v. *O'Brien, supra*, the Court articulated standards by which the government can constitutionally prohibit conduct where speech and no speech elements are combined.

> (T)he Government regulation is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (*O'Brien, supra*, 391 U.S. at 377.)

In *O'Brien* the Court upheld a conviction for burning a draft card. The Court found that the prohibition against

destroying draft cards was a necessary and proper exercise of the government's power to raise and support an army and to insure efficient functioning of the Selective Service System. Quite different considerations are present in the instant case.

First, the government has no interest in protecting the American flag from "contempt". On the contrary, it is well established that the state cannot enforce a showing of respect for the flag. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), *Street, supra.*

Second, it is clear that the express purpose of G.L. Ch. 264 §5 is to proscribe the expression of certain kinds of ideas about the flag.

Third, the restriction on First Amendment freedoms in the instant case is far from incidental. Instead, it is central to the purposes of the statute.

Were Goguen charged with burning, mutilating or trampling upon the flag a different result might obtain. See, e.g. *Crosson* v. *Silver, supra.* However in the instant case the defendant merely wore a replica of the flag in a certain manner. Here the government seeks to punish a peaceful act which does no more than express an idea. Such conduct, like wearing armbands and flying red flags, is purely related to the expression of ideas. As such, it should be accorded the same protection under the First Amendment as those forms of symbolic speech.

3. *The expression of opinion conveyed by the defendant's conduct was constitutionally protected.*

Goguen has been convicted and sentenced to six months in the House of Correction for conduct expressing strong, negative feelings about the United States through the use of its symbol, the flag. In *Street* v. *New York, supra,* the Supreme Court held that the expression of defiant or indeed contemptuous opinions about the flag or the country is constitutionally protected. In determining that Street

could not have been punished for his expression of opinion, the Court applied a quadripartite test.

> In these circumstances we can think of four governmental interests which might conceivably have been furthered by punishing appellant for his words: (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem. (*Street, supra,* at 590-591.)

The Court concluded that none of the foregoing government interests applied to Street. An application of that analysis to the case at bar yields the same result; that Goguen can not constitutionally be punished for his expression of opinion.

As in *Street,* Goguen "did not urge anyone to do anything unlawful", *Id.* at 591. As in *Street,* Goguen's conviction cannot stand because of a "possible tendency" of his expressed idea to "provoke violent retaliation." As the Court said in *Street,*

> (t)hough it is conceivable that some listeners might have been moved to retalitate upon hearing appellant's disrespectful words, we cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of "fighting words" which are likely to provoke the average person to retaliation, and thereby cause a breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942). (*Id.* at 592.)

As in *Street*, the fact that the ideas expressed by Goguen might offend or shock passers-by cannot support his conviction.

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. (*Id.* at 592.)

More recently the Court has held that the public use of a particularly offensive "vulgar allusion" could not be constitutionally punished. *Cohen* v. *California*, — U.S. —, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). The Court was of the opinion that despite the objectionable and offensive nature of Cohen's expression, it was permissible speech in a public forum.

> . . . (In) arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., Organization for a Better Austin v. Keefe, 401 U.S. , 91 S. Ct. 1575, 28 L. Ed. 2d (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rown v. United States Post Office Dept., 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech". (*Id.* at

738, 90 S. Ct. at 1491. *Cohen, supra,* 91 S. Ct. 1786, 29 L. Ed. 2d 291.)

As in *Street,* the Court in *Cohen* also considered and rejected an argument that the communication might incite violent retaliation. The Court reiterated that such a rationale must be based upon a probability of violence rather than an "undifferentiated fear or apprehension of disturbance."

> The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 103, 508, 89 S. Ct. 733, 737, 21 L. Ed. 2d 131 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. (*Cohen, supra,* — U.S. —, 91 S. Ct. 1787, 29 L. Ed. 2d 292).

In the instant case there has been no showing that Goguen's expression was intended or likely to incite violence, or that violence or civil disturbance was caused

by it. Indeed, the evidence was that passers-by were amused rather than angered. (R. 3).

Also, it is quite clear that the fourth rationale set forth in *Street*, of causing proper respect for our national emblem, cannot withstand constitutional scrutiny. The state cannot constitutionally require its citizens to bow to some political orthodoxy. *Street, supra,* at 593.

Thus, since Goguen's conduct amounted to constitutionally protected symbolic speech, and since the ideas conveyed are similarly constitutionally protected, the Court below erred in denying Goguen's motion to dismiss the complaint and his motion for a directed verdict. G.L. Ch. 264 §5 is unconstitutional on its face because it purports to punish constitutionally protected expression of ideas. Furthermore, upon the facts of this case, the defendant was convicted for exercising constitutionally protected freedom of expression. The conviction below should therefore be reversed by this Court.

B. General Laws Ch. 264 §5 on its Face Violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution in That it Is Overly Broad.

In the area of First Amendment freedom the arguments for why a statute is overly broad in violation of the Fourteenth Amendment are often similar to the First Amendment arguments. This is true because the result or effect of each constitutional infirmity in the restriction of free individual expression is usually the same.

The Supreme Court has consistently struck down statutes which are so overbroad as to bring within their ambit conduct protected by the First Amendment. *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Thornhill* v. *Alabama,* 310 U.S. 88 (1948); *Stromberg* v. *California,* 283 U.S. 503 (1931). More recently several courts across the country have held flag desecration statutes very sim-

ilar to G.L. Ch. 264 §5 to be unconstitutionally overbroad. *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D.N.C., 1971). *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir., 1970), cert. denied 400 U.S. 956 (1970); *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (Del., 1970); *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz., 1970).

Although distinguishable from the case at bar, the Supreme Court in the case of *United States* v. *O'Brien, supra*, set forth criterion for determining when the government may regulate symbolic conduct or conduct which has "speech" and "non-speech" aspects. As was stated earlier, a government regulation in this area will not be constitutionally justified unless it meets the following four criteria:

i. It is within the constitutional powers of the government;
ii. it furthers an important or substantial government interest;
iii. the governmental interest is unrelated to the suppression of free speech; and
iv. the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of legitimate government interest. (*O'Brien*, supra, 377).

The only state governmental power which could justify regulation of words or conduct pertaining to the flag would be the police power. *Crosson* v. *Silver, supra.* Thus it must be determined whether there is an important governmental interest to be served by regulating the treatment of the United States flag through the state's police powers.

The Supreme Court in *Street, supra,* analyzed what might be the government's interest in regulating contemptuous words directed at the flag. Although the statute in the present case regulates both speech and conduct,

there appears to be no rational difference in state interest between regulation of words and regulation of acts which relate to the flag, if it is conceded that the state has no property interest in flags belonging to individuals. *Crosson* v. *Silver, supra,* pp. 1087-88.

In *Street* the Court found that the state's interest might be (1) an interest in deterring incitement of others to commit unlawful acts; (2) an interest in preventing words so inflammatory as to provoke others to retaliate physically against the speaker, thus causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked at such words; and (4) an interest in assuring conduct showing proper respect for our national emblem. The Court held that none of these interests could constitutionally justify conviction of the appellant under New York's flag statute for his use of contemptuous words directed against the United States flag. *Street* v. *New York, supra,* p. 591.

It is suggested that the conduct of the appellant in the present case, as the speech in *Street,* did not incite others to unlawful acts, nor did it provoke others to physical retaliation against the appellant (R. 3). In fact, the statute on its face does not attempt to limit itself to those acts and words which might incite others to unlawful conduct or to a breach of the peace, but proscribes all words or acts, however innocuous, which show contempt for our flag. Thus the present case is distinguishable from that in which the legislature has narrowly drawn a proscription against conduct within the legislative competence, see *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), and the statute on its face goes far beyond any legitimate state interest of preventing incitement to riot or a breach of the peace. An individual could be prosecuted under General Laws, c. 264 §5 for sticking his tongue out at the flag or for revealing his distaste for the flag as it re-

presents the presently embodied government administration. The Commonwealth has thus gone far beyond what might have been a legitimate state interest under the first two possibilities suggested by *Street*.

It is also well settled that First Amendment conduct may not be prohibited merely because it offends the sensibilities of those who may observe or listen (*Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Street* v. *New York*, *supra*), nor may the state legislate allegiance to or respect for our flag. *Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

If it is assumed for the sake of argument that the state might have a legitimate interest in regulating words and conduct with respect to the flag, and that this interest would satisfy the second criterion set forth in *O'Brien*, the fact that General Laws, Chapter 264, §5 goes far beyond the furtherance of that governmental interest and in so doing infringes upon First Amendment freedoms indicates that it fails under the fourth *O'Brien* criterion.

In *O'Brien*, the Court found a legitimate governmental interest in requiring a person to preserve his draft card which was totally independent of the free speech element involved in destroying a draft card. The court thus found that

> The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. (*O'Brien*, *supra*, p. 382).

The Commonwealth in the present case has directed its attention to communication integral to the apellant's conduct. In these times when our country is so divided between the hawks and the doves and between the "love-it-or-leave-it" and those who are critical of our government's policies, there is nothing equivocal about flag usage. A

flag-draped casket, a flag on a policeman's shoulder or lapel, a flag displayed upside down and a flag on the seat of the pants; each has its meaning. General Laws, Chapter 264, §5 is designed to prevent the latter from being expressed and is thus an unconstitutionally overbroad restriction of freedom of speech. The often quoted words of Justice Jackson in the *Barnette* decision are not new, but they offer strong insight into the question before this court:

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.*
>
> If these is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. (*Barnette, supra* pp. 641-642 emphasis added).

The United States District Court for the District of Maryland recently struck down a Maryland statute al-

most identical to that in the present case on the grounds that it proscribed within its ambit constitutionally protected conduct and words.

> The statute attacked here, however, makes no effort to limit the facts and circumstances under which gestures are forbidden. The Court believes that the rationales of *Barnette* and *Stromberg* together compel the conclusion that the punishment of peaceful symbolic acts rejecting the political ideas bespoken by the flag is as alien to the mandate of the First Amendment as is compulsion to signify adherence. That this statute proceeds, heedless of the guarantees of that amendment, determines its invalidity. (*Hodsdon* v. *Buckson*, 310 F. Supp. 528 (1970)).

The defendant in the present case has been convicted under an almost identical statute which is equally unconstitutional, and thus this Court should reverse his conviction below.

C. The Commonwealth Failed to Prove its Case Against the Defendant by its Failure to Prove the Element of Intent.

Although it has not been discussed by many Courts in dealing with flag desecration statutes, there is a strong reason why intent should be an element of the crime of flag desecration. See Note; *Flag Desecration: Illegal Conduct on Protected Expression*, 22 Case West. L. Rev. 555 (1971).

The Supreme Court has held in the case of *Smith* v. *California*, 361 U.S. 147 (1959) that a bookstore owner could not be convicted under a local statute which made it a crime to sell obscene literature, regardless of whether the proprietor knew the contents of the books sold. The Court in *Smith* directed itself to the problem of applying strict liability in the area of First Amendment freedoms:

> But our holding in *Roth* does not recognize any state

> power to restrict the dissemmation of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. (*Id.* at 152).

The Court in *Smith* went on to compare the censorship statute with strict liability statutes in the area of food distribution.

> There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. (*Id.* at 152-153).

The New York Court of Appeals dismissed an argument that intent had to be an element for conviction under their flag desecration statute in the case of *Radich* v. *New York*, 26 N.Y. 2d 114 (1970), affd. by an equally divided Court, 39 U.S. L.W. 3422 (dec. Mar. 24, 1971). However, the cases upon which the New York Court's decision was based were in the area of food and liquor distribution and are thus clearly distinguishable under *Smith, supra.*

The Supreme Court of the State of Washington has held that a criminal intent is a sine qua non for conviction under its flag desecration statute.

> . . . (t)o hold up to contempt is conduct involving moral turpitude. Therefore, to sustain a conviction of desecrating the flag . . . the acts must have been done knowingly and intentionally with the intent and purpose of . . . desecrating it or holding it publicly up to contempt. (*State* v. *Turner*, 474 P.2d 91, 94-95 (1970)).

Certainly the state would not attempt to prosecute a person for burning a worn flag for this is the recognized

flag etiquette for discarding old flags. However, the Commonwealth might very well prosecute one who burns a flag in protest. The element of intent is inherent. The Commonwealth in the present case introduced no evidence to show whether the defendant's conduct was intended to be contemptuous. The Court below should thus have allowed defendant's motion for a directed verdict. This Court should therefore reverse the conviction below.

D. The Decision of the Lower Court in Convicting the Defendant Should Be Reversed Because the Defendant Did Not Treat Contemptuously a "Flag of the United States."

The flag of the United States is defined by Executive order number 10834 issued by the President of the United States pursuant to Title 4, United States Code, chapter one, section one. Mr. Smith, the defendant's expert vexillologist, testified at the trial that he was familiar with the type of "flag" the defendant was alleged to have been wearing and that such a flag does not conform to the official standards (R. 4).

It is obvious that there must be some definition of what is a flag of the United States within the meaning of G.L. c. 264 §5:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. (*Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1930)).

In the case of *Parker* v. *Morgan*, 322 F. Supp. 585 (1971), a United States District Court held unconstitutional the North Carolina flag statute, stating:

> Thus we think for a flag control statute to be constitutional it must precisely define a flag and carefully avoid expropriation of color and form other than the defined emblem itself, e.g. it seems to us that

red, white and blue trousers with or without stripes are trousers and not a flag, and it is beyond the state's competence to dictate color and design of clothing, even bad taste clothing (*Parker* at 588).

The Massachusetts legislature has recently amended Chapter 264, §5 by the Acts of 1971, Chapter 74, to read "such flag *or any representation thereof*" (emphasis added). It seems as if the legislature has by this amendment tried to carry the flag desecration statute to its extreme; i.e. "by expropriation of color and form". It can thus be implied that the law as it existed at the time of the conviction below applied only to actual flags of the United States. But where is the line to be drawn? Is a child's drawing of a flag "the flag of the United States" within G.L. c. 264 §5?

In order to avoid such ridiculous extremes, the line should be drawn according to the official definition of the United States flag. Thus the Court below erred in not instructing the jury that in order to find the defendant guilty it had to find that the flag used in the alleged contemptuous treatment was an official flag as defined by Executive Order number 10834 and the defendant conviction should be reversed.

E. The Trial Judge Committed Reversible Error by Failing to Allow Defendant to Introduce Through His Expert Examples of Contemporary Flag Usage.

In order for the jury to properly decide whether the action of the defendant was in fact contemptuous, it had to relate the conduct of the defendant to standards of present day usage of the flag. The defendant offered to show to the jury, through his expert, evidence which would indicate that his treatment of the flag was no different or more contemptuous than its every day use in movies, magazines, newspapers, clothing and numerous other commercial and non-commercial articles. The failure of

the trial judge to allow the defendant to introduce this evidence to the jury was prejudicial error and thus the defendant's conviction should be reversed.

CONCLUSION

The conduct of the defendant in using the flag in an act of protest against our government is as pure a form of "symbolic speech" as the wearing of a black arm band, the clenched fist salute and the use of a red flag as a symbol against organized government, all of which are protected by our Constitution. Those who love our flag and would thus allow the state to prohibit protest against it or protest against our government by use of the flag are apparently well motivated, but they can only serve to defeat their purpose. For the love which is embodied in our flag is not derived from its material or workmanship, but from the constitutional ideas of democracy and individual freedom which that flag represents. If the state is allowed to imprison the defendant for his peaceful political protest, this will be an act of flag desecration far superior to the harmless conduct of the defendant.

The judgment of the Court below should thus be reversed.

Respectfully submitted,
C. MICHAEL MALM
EVAN T. LAWSON
Attorneys for the Defendant

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
WORCESTER COUNTY JANUARY SITTING, 1972
No. 14,933

COMMONWEALTH
v.
VALARIE GOGUEN

BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

A complaint, District Court No. 38705, was brought in the District Court of Leominster on January 30, 1970, against the defendant, Valarie Goguen, which charged that the defendant did publicly treat contemptuously the flag of the United States in violation of G.L. c. 264, §5 (R. 1).

The defendant was found guilty in the Leominster District Court and duly filed his appeal to the Worcester Superior Court (R. 1).

Trial was commenced at the Worcester Superior Court on the fourteenth day of April, 1971 (R. 1). During the course of the trial the defendant filed the following motions.

1. Motion to dismiss. This motion was heard prior to presentation of evidence. The motion was denied and the defendant took exception (R. 1-2).

The evidence during the trial was that on January 30, 1970, the defendant, Goguen, was observed walking on Main Street in Leominster and at that time police officers observed that he had an American flag, approximately 3″ x 5″ or 4″ x 6″ sewn to his blue jeans in the area of his buttocks; that a crowd of people was gathering around the defendant and that some of those people were laughing (R. 2-3).

2. At the conclusion of the Commonwealth's case, the defendant filed a motion for directed verdict. After argument, the motion was denied and the defendant's exception was duly noted.

The jury returned a verdict of guilty and the defendant, Goguen, received a sentence of imprisonment of six months in the House of Correction (R. 2, 6).

The case is before the court on a bill of exceptions (R. 1-4).

SUMMARY OF EXCEPTIONS

Exceptions are presented to the court as follows:

1. That the trial court erred in denying defendant's motion to dismiss because G.L. c. 264, § 5, fails to charge a crime and because it is unconstitutional (Excep. 1; R. 1-2).

2. That the trial court erred in denying the motion for a directed verdict on the complaint at the close of the Commonwealth's case (Excep. 2; R. 2).

3. That the trial court erred in excluding evidence by an expert, a vexillologist, as to the use of the American flag in advertisements, in newspapers, magazines, in objects of wearing apparel and other items that are used in the United States (R. 2).

4. That the trial court erred in refusing to instruct the jury as requested in instructions Nos. 3 and 4 in which it was requested that the judge charge that it had to be an "official" American flag (R. 2).

ARGUMENT

There was no error in the trial court's denying defendant's motion to dismiss or the defendant's motion for a directed verdict.

The defendant filed a motion to dismiss prior to commencement of trial. After oral argument, the motion was denied and the defendant duly noted his exceptions (R. 2).

There was no error in denying this motion. The issue

raised in this motion was that G.L. c. 264, § 5, was unconstitutional because it violated the defendant's right to freedom of speech and the statute is overly broad and vague and incapable of fair and reasonable interpretation (R. 1).

The Commonwealth contends that G.L. c. 264, § 5, does not deprive the defendant of freedom of speech. The statute refers to affirmative overt acts against the American flag and does not refer to speeches against the American flag. We are dealing with a statute that was passed to prevent desecration of the American flag by an act of a person.

General Laws, c. 264, § 5, reads "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts . . ." It is submitted that the words mutilate, trample upon, deface or treat contemptuously refer to overt acts against the flag and not to speech against the flag.

It is submitted that the Commonwealth of Massachusetts, as well as any other state, has the authority to pass a statute prohibiting desecration of the American flag. The Commonwealth has the authority to protect the American flag from acts of desecration and disgrace. The legitimate state interest in the protection of the flag was early recognized in *Halter* v. *Nebraska*, 205 U.S. 34 (1907). Justice Harlan stated in that case "[I]t has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907).

The Commonwealth has a legitimate interest in preventing breaches of the peace. The fact that in this case no breach occurred is immaterial. At another time a disturbance might have been caused by the defendant's actions.

The state may legitimately control such activities in preventing violence and maintaining public order. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

General Laws c. 264, § 5, is a deliberate act of the Massachusetts legislature to prevent desecration of the American flag and it comes before the courts with the presumption of constitutionality and should be upheld unless its unconstitutionality clearly, positively and unmistakably appears.

Robertson v. *Ott*, 284 F. Supp. 735.

Hannan v. *Haverhill*, 38 F. Supp. 234, 120 F.2d 87; cert. den. 314 U.S. 641 (1941).

Where a statute is susceptible of two constructions, one which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which will render it valid if such can be done without violence to a reasonable meaning of the language used, even though other construction may be equally reasonable.

Miller v. *Municipal Court*, 22 Cal. 2d 818, 828 (1943).

Los Angeles v. *Belridge Oil Company*, 42 Cal. 2d 823, 832.

Norman R. Gravin, Inc. v. *Ford Motor Company*, 163 F. Supp. 42.

The defendant in his brief relies heavily on the decision in *Street* v. *New York*, 394 U.S. 576 (1969), but it is respectfully submitted that the New York statute in *Street* v. *New York*, is not the same as the statute in effect in Massachusetts. A reading of G.L. c. 264, § 5, shows that our statute relates to overt acts against the flag. Nowhere does it contain, as in the New York statute, the words "by act or words." In *Street* heavy emphasis was laid on the use of the term "words" in the New York statute. This placed

the New York statute under the First and Fourteenth Amendments regarding the defendant's right to freedom of speech.

The defendant, Goguen, was not charged with an act of contempt against the flag for something he said but, rather, he was charged with an overt act of desecration against the American flag, wearing the American flag sewn to the seat of his pants in the area of his buttocks.

The defendant argues that the wearing of the American flag on the seat of his pants was a "symbolic speech" and this protects him under the First Amendment.

However, the government contends that this was not an act of "symbolic speech" but rather an overt act.

In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), Chief Justice Warren said "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Even if we concede that the defendant's acts were "symbolic speech" it does not follow that the same kind of freedom is afforded him by the First Amendment as is afforded to those who communicate ideas by pure speech. Where speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in controlling the non-speech element can justify incidental limitations on First Amendment freedoms. *United States* v. *O'Brien, supra.*

The constitutional guarantee of free speech covers the substance rather than the form of communication and the state may regulate the use of a particular form, if it does so from a legitimate state interest.

The element of contempt can be inferred by the conduct of the defendant. The evidence was that the defendant had sewn to the seat of his pants in the area of his buttocks an

American flag and was publicly displaying this on Main Street in Leominster. The jury could draw a reasonable inference that this overt act was done by the defendant to cast contempt on the American flag.

Proof of defendant's intent depended entirely upon the inferences of which the evidence was rationally susceptible. These inferences need not be necessary or inescapable. It is enough if they are reasonable and are not too remote or prohibited by some rule of law. *Commonwealth* v. *Williams*, 312 Mass. 553, 557.

The intention of the defendant was a question of fact to be determined from all the circumstances. *Commonwealth* v. *Walker*, 108 Mass. 309.

There was no error in the trial judge's ruling excluding testimony regarding various use of the United States flag and the stars and stripes pattern.

The defendant, through Whitney Smith, a vexillologist, attempted to put into evidence various national magazines, newspapers and other periodicals, and articles of clothing and other products (R. 3-4). The Commonwealth objected to their admissibility on the ground that it was not relevant. The trial judge excluded such evidence and the defendant noted exception and made offer of proof (R. 2).

At no time was the vexillologist ever asked for his expert opinion. He was merely being used to try to put into evidence various articles described above.

Expert testimony may be appropriate at the discretion of the trial judge even though not necessary.

Peloquin v. *Robert Northridge Furniture Co.*, 341 Mass. 543, 547.

Commonwealth v. *Butynski*, 339 Mass. 151, 153, 158.

Expert testimony is permitted only where the inference to be drawn is one for which more than the equipment of

everyday experience is required. *Commonwealth* v. *Makarewicz*, 333 Mass. 575, 591-592.

It is submitted that the subject matter of the use of the American flag was one that would not require expert testimony and it is proper to assume that jurymen read national magazines, newspapers and periodicals in everyday life and are familiar with their contents.

Some exceptions have been made to the rule on expert testimony. G.L. c. 272, § 28F, relating to expert testimony in an obscene book case. G.L. c. 233, § 79C, relating to expert testimony in medical malpractice cases. Nowhere in our statutes has an exception been made for an expert to testify in a case involving the American flag.

It is submitted that this is a matter within the discretion of the trial judge and his refusal to allow this evidence to be presented to the jury as to the use of the American flag was not an abuse of discretion. It was not relevant to this complaint as to the use of the American flag or replicas of American flags in other states of this country.

There was no error in the trial judge's refusal to charge that the jury must find that the flag involved was an "official" American flag.

The trial judge charged the jury that they must find that it was an American flag, in accordance with G.L. c. 264, § 5, which reads "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . ."

Nowhere in this statute does the word "official" appear. The Legislature intended to protect all American flags and not just "official" flags as spelled out in Executive Order 10,834.

It is common knowledge that very few American flags that fly over our land meet the strict requirements of Executive Order 10,834.

CONCLUSION

For the reasons stated above, there was no error and the judgment of the Superior Court should be affirmed.

Respectfully submitted,

WILLIAM T. BUCKLEY
District Attorney
for the Middle District
JOHN M. O'CONNOR
Assistant District Attorney

SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 14,933

COMMONWEALTH *v.* VALARIE GOGUEN

(Rescript Opinion - February 2, 1972)

The defendant was convicted of publicly treating contemptuously the flag of the United States in violation of G.L. c. 264, § 5. The case is before us on the defendant's amended bill of exceptions. There was evidence that on Main Street in Leominster he was wearing a cloth American flag sewn to the seat of his blue jeans, and that certain bystanders were amused. We reject his claim that the statute is on its face or as applied to him a restraint upon the right of freedom of speech guaranteed by the First Amendment to the Constitution of the United States. *Halter* v. *Nebraska*, 205 U.S. 34, 41. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574. *United States* v. *O'Brien*, 391 U.S. 367, 376. *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 743-746 (S.D. Ill.). *Oldroyd* v. *Kugler*, 327 F. Supp. 176, 178 (D. N.J.). Compare *Cowgill* v. *California*, 396 U.S. 371, 372 (concurring opinion of Harlan, J.); *Hiett* v. *United States*, 415 F. 2d 664, 672 (5th Cir.), *cert. den. sub nom. United States* v. *Hiett*, 397 U.S. 936. *Long Island Vietnam Moratorium Comm.* v. *Cahn*, 437 F. 2d 344, 348-350 (2d Cir.), *cert. den.* 400 U.S. 956. His communication, if any, was so thoroughly inarticulate as to lack the slightest redeeming social importance. See *Roth* v. *United States*, 354 U.S. 476, 484. He was not prosecuted for being "intellectually . . . diverse" or for "speech," as in *Street* v. *New York*, 394 U.S. 576, 593-594, or for a "vulgar allusion," as in *Cohen* v. *California*, 403 U.S. 15, 20. Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here. *Sutherland* v. *DeWulf*, *supra*, at 746-749. *Oldroyd* v. *Kugler*, *supra*, at 178-179. See *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340. Compare Rep. A. G., Pub. Doc. No. 12 (1968)

192-193. Compare *Hoffman* v. *United States*, 445 F. 2d 226, 228-229 (D.C. Cir.), with *Hodsdon* v. *Buckson*, 310 F. Supp. 528, 536 (D. Del.), *Crosson* v. *Silver*, 319 F. Supp. 1084, 1089-1090 (D. Ariz.), and *Parker* v. *Morgan*, 322 F. Supp. 585, 588-593 (W. D. N. C.). The jury could infer that the violation was intentional without reviewing any words of the defendant. *Commonwealth* v. *Williams*, 312 Mass. 553, 557. *State* v. *Turner*, 78 Wash. 2d 276, 283-284. See *People* v. *Radich*, 26 N.Y. 2d 114, 125, *aff'd.* by an equally divided court, *sub. nom. Radich* v. *New York*, 401 U.S. 531. Compare *Smith* v. *California*, 361 U.S. 147, 152. The statute does not require that the flag be "official." There was no abuse of discretion in excluding evidence offered through a "vexillologist" as to the contemporary use and treatment of the flag. *Johnson* v. *Orange*, 320 Mass. 336, 338. *Scully* v. *Joseph Connolly Ice Cream Sales Corp.*, 336 Mass. 392, 394. There was no error.

Exceptions overruled.

UNITED STATE
DISTRICT OF

TES DISTRICT COURT
F MASSACHUSETTS

VALAR
PET

Misc. Civil No. 72-22-LC

RIE GOGUEN
TITIONER

v.

JOSEPH SMITH
of Worc

TH, as he is Sheriff
cester County

RESP

SPONDENT

HABE

CAUSE—
EAS CORPUS

DOCKET

T ENTRIES

1972

Feb. 23 Petition for Writ
of Habeas Corpus, filed.

23 CAMPBELL, D. J.
Ct directs OSC to issue rtnble
2/28/72; 4 pm; o
only on quest. bail.

23 Order to Show
Cause issued, returnable Feb-
ruary 28, 1972 at
t 5:00 PM and to appear in the
Court of Appeals
s Courtroom only on question of
bail on February
y 29, 1972 at 4:00 PM.

23 Marshal's return
n of summons w/s/o 2-23-72,
filed.

28 Respondent's mo
otion to dismiss; Return; and
Memo in opp to
applica for bail.

29 CAMPBELL, D. J.
J. Hearing upon ret. OSC on
quest. bail; After
r hearing & args, advsm.

Mar. 2 CAMPBELL, D. J.
ORDER admitting to bail $1,000,
10% to be deposi
sited . . . (see below).

2 CAMPBELL, D. J.
ORDER. 1) Parties by Mar. 13
to submit designa
ation of all papers and proceed-
ings in State cou
urt . . . ; 2) Also (same date)
indicate in writin
ng whether either side wishes to

1972

be heard further . . . or if wish to submit without further argument or hearing.

3 CAMPBELL, D. J. All parties before Court; petitioner agrees to restrict travel to Massachusetts; if wish to go over Border, bring to attention of Court; Surety bond executed by petr and surety; 10% deposited ($100).

9 Petitioner's motion for summary judgment, filed. c/s.

9 Petitioner's motion to extend time for filing brief in support of motion for summary judgment, filed.

10 CAMPBELL, D. J. Petitioner's motion to amend bail conditions to work in Portsmouth, New Hampshire, filed. c/s "Upon representation of petitioners' counsel that the Attorney General does not object, the motion is Allowed."

10 CAMPBELL, D. J. Petitioner's motion to amend bail conditions, filed "Upon representation of petitioner's counsel that the Attorney General does not oppose, the motion is Allowed.

13 Joint Designation, and copy of State court record filed.

13 CAMPBELL, D. J. ORDER ENTERED. ". . . 1. That motions for summary judgment be filed forthwith; 2. That the case be set down for oral argument at 4:00 P.M., Wednesday, March 1972." Copy to Messrs Chase, Lawson

27 Memorandum in support of petitioner's motion for summary judgment, filed. c/s

28 Substitute memorandum in support of petitioner's motion for summary judgment, filed. c/s.

30 CAMPBELL, D. J. Hearing on petitioner's motion for summary judgment; arguments; advisement.

1972

Apr. 4 Respondent's memorandum in support of motion to dismiss, filed.

May 2 Marshal's return on Habeas Corpus Ad Prosequendum with service made on March 3, 1972, filed.

25 CAMPBELL, D. J. MEMORANDUM AND OPINION ENTERED. "... I conclude that the petitioner's conviction was under a statute with applicable provisions so encompassing and vague as to violate the First and Fourteenth Amendments. Accordingly, an order is to be entered that the writ of habeas corpus issue and that the petitioner be released from the defendant's custody. Copy to Messrs. Lawson and Chase. West Publishing Co. and The Bureau of National Affairs, Inc.

June 13 CAMPBELL, D. J. ORDER AND JUDGMENT ENTERED: "...It is Ordered that the sentence imposed upon petitioner, Valarie Goguen, by the Superior Court of the Commonwealth of Massachusetts for Worcester County be vacated, and that he be discharged from such sentence, said vacation of sentence and discharge to take effect seven (7) days after the date of entry of this Order and Judgment. Copy to Messrs. Lawson and Chase.

15 Respondent's Notice of Appeal filed. Cpy to Evan Lawson, Haussermann, Davison & Shattuck.

15 Certified copy of docket entries and original pleadings delivered to the Court of Appeals.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner Valarie Goguen brings this petition for a writ of Habeas Corpus pursuant to 28 U.S.C. § 2241.

As grounds therefor the petitioner states:

1. On April 15, 1971, the petitioner was found guilty after trial in the Worcester County Superior Court of a complaint charging that he did publicly treat contemptuously the flag of the United States in violation of G.L. ch. 264 § 5. The petitioner was sentenced to a term of six months in the Worcester County House of Correction.

2. The petitioner is now confined in the Worcester County House of Correction pursuant to that sentence in the custody of the respondent.

3. A summary of the material evidence adduced at the petitioner's trial is as follows:

On January 30, 1970, a Leominster Police Officer observed the petitioner walking in the business district of Leominster wearing a short coat and casual type pants. Sewn to the left side of the petitioner's pants was a miniature American flag.

On the same day another Leominster Police Officer observed the petitioner standing with a group of persons on Main Street in Leominster. The petitioner was wearing a short coat, blue jeans and shoes. The officer was able to observe a cloth American flag approximately 3 x 5 or 4 x 6 inches sewn to the blue jeans in the area of the left portion of the petitioner's buttocks. While the officer questioned the petitioner concerning the flag, the other persons present were laughing.

4. The petitioner was illegally arrested and convicted in violations of his rights under the First and Fourteenth

Amendments to the United States Constitution in that G.L. Ch. 264 § 5 is unconstitutional on its face and as applied to him, because it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials. *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970), See, *Street* v. *New York*, 394 U.S. 576 (1969).

5. The petitioner has satisfied the requirements of 28 U.S.C. § 2254 by prosecuting an appeal on exception to the Supreme Judicial Court of Massachusetts wherein the petitioner assigned as error the deprivation of constitutional rights herein complained of. *Commonwealth* v. *Goguen*, Mass. , 1972 Mass. Adv. Sheets .

Wherefore, because of the foregoing, the petitioner is being detained and restrained of his liberty by the respondent in violation of the Constitution of the United States and therefore prays that:

1. A Writ of Habeas Corpus issue directly to the respondent to produce before this Court the body of the petitioner together with the cause of his detention.

2. An order discharging the petitioner from custody.

3. The Court order that the petitioner be released on his own recognizance or such bail as the Court deems proper pending final determination of this petition.

4. The Court issue such other orders as may be appropriate.

By his attorney,
Evan T. Lawson
Glickman, Lawson & Tenney
14 Beacon Street
Boston, Massachusetts 02108

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

MOTION TO DISMISS

Now comes the respondent and, by his attorney, moves this Court to dismiss the petition for a writ of habeas corpus filed herein since it fails to state a claim upon which relief may be granted.

By his attorney,
ROBERT H. QUINN
Attorney General
CHARLES E. CHASE
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

RETURN

Now comes the respondent and, by his attorney, makes the following return and answers to the petition for a writ of habeas corpus filed herein:

A. 1-3. Respondent admits the allegations contained in paragraphs 1 through 3 of the petition.

4. Respondent denies the allegations contained in paragraph 4 of the petition.

5. Respondent admits the allegations contained in the first sentence of paragraph 5 of the petition but denies the remaining allegations contained in said paragraph.

B. And further answering, respondent says that the petition fails to state a claim upon which relief may be granted.

By his attorney,
ROBERT H. QUINN
Attorney General
CHARLES E. CHASE
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Defendants move the court to enter summary judgment in accordance with Rule 56 (a) (c) of the Federal Laws of Civil Procedure on the ground that they are entitled to such judgment on the pleadings and other documents on file as a matter of law, and that there is no issue of fact relevant to such determination as yet unresolved.

By his attorney,
EVAN T. LAWSON

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

ORDER

March 2, 1972

CAMPBELL, D.J.

1. The parties shall before March 13, 1972, submit to the court a designation of all papers and proceedings in the state court which in their judgment should be included in the record of the present case for consideration by this Court.

2. Also by March 13, 1972, the parties shall indicate to this Court in writing whether either side wishes to be heard further on the matters raised in the Petition and Return, or whether they wish to submit them without further argument or hearing.

(s) LEVIN H. CAMPBELL
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

DESIGNATION

The petitioner and respondent hereby designate that for purposes of the proceedings on this petition for a writ of habeas corpus the documents shall be the State Court record as presented to the Supreme Judicial Court of Massachusetts, the briefs of the parties in the Supreme Judicial Court of Massachusetts, and the same are hereto attached.

The parties further say that they desire oral argument on their respective motions for summary judgment and to dismiss.

By

(s) EVAN T. LAWSON
Attorney for Petitioner

(s) CHARLES E. CHASE
Attorney for Respondent

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 72-22-LS

VALARIE GOGUEN
PETITIONER
v.
JOSEPH SMITH
RESPONDENT

MEMORANDUM AND OPINION

May 25, 1972

CAMPBELL, D.J.

I

Petitioner applies for a writ of habeas corpus to obtain release from a six months sentence to the House of Correction imposed after his conviction in the Worcester County Superior Court. The conviction was upon a complaint that he "did publicly treat contemptuously the flag of the United States" in violation of G.L. c. 264 §5.[1] The

[1] §5. Flag; penalty for misuse

Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used

conviction was affirmed by the Supreme Judicial Court. *Commonwealth* v. *Goguen*, 1972 Mass. Ad. Sh. 303, 279 N.E. 2d 666.

At the time he filed this petition, (February 23, 1972), petitioner had very recently commenced serving the sentence imposed by the Superior Court. The sentence had previously been stayed by the Massachusetts Supreme Judicial Court pending consideration of the state appeal. On March 3, 1972, this Court released the petitioner on bail pending further consideration of his case.

The defendant has filed a return and a Motion to Dismiss the Petition.

The case is submitted by agreement on a record consisting of the record and briefs presented to the Supreme Judicial Court.

The issues were argued by the parties, and briefs were submitted. After consideration, it is my opinion that the writ must be granted.

---

to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag. Notwithstanding the foregoing, there may be attached to the staff bearing a flag of the United States or of Massachusetts belonging to an organization of veterans of the Civil War, to a camp of the United Spanish War Veterans, to a post or department of The American Legion, or to a post or department of the Veterans of Foreign Wars of the United States, or to a post or department of the Jewish War Veterans of the United States, or to a camp or department of the Sons of Union Veterans of the Civil War, or to a barracks or department of the Veterans of World War I of the U.S.A., or belonging to or used in the service of the United States or the commonwealth, a streamer having inscribed thereon the names of battles and the name and number of the organization to which such flag belongs. For the purposes of this section, a flag shall be deemed to continue to belong to any organization of veterans hereinbefore specified, although such organization has ceased to exist, during such time as it remains in the lawful ownership or custody of any other of the aforesaid organizations or of the commonwealth or of any political subdivision thereof, or of any patriotic or historical society incorporated under the laws of the commonwealth or determined by the adjutant general to be a proper custodian thereof.

II

On January 30, 1970, a Leominster Police Lieutenant observed the petitioner standing with a group of persons on Main Street in Leominster. The petitioner was wearing a short coat, blue jeans and shoes. A cloth American flag, approximately 3 x 5 or 4 x 6 inches was sewn to the blue jeans in the vicinity of the left portion of the petitioner's buttocks. When the Lieutenant questioned the petitioner, the other persons present were laughing.

On the same date another police officer saw the petitioner "walking in the downtown business district of Leominster, wearing a short coat, casual type pants and a miniature American flag sewn on the left side of his pants."

The petitioner was arrested upon a warrant issued by the Leominster District Court. On January 31, 1970, a complaint was issued that the petitioner "on the thirtieth day of January ... at Leominster did publicly treat contemptuously the flag of the United States in violation of G.L. c. 264, §5 as amended."

The petitioner was tried and convicted on this charge in the District Court.

He appealed to the Superior Court, where he was tried before a district court justice sitting by designation and a jury on April 14 and 15, 1971. At the outset of trial in the Superior Court, the petitioner presented and argued a Motion to Dismiss the Complaint on the ground that G.L. c. 264, §5, is unconstitutional on its face and as applied to him under the First and Fourteenth Amendments of the United States Constitution. In the motion, the petitioner asserted that the statute violated the right to due process "in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials." The Motion to Dismiss was denied by the trial judge. A subsequent motion for directed verdict was also denied after argument.

At the trial, the two police officers who had observed the petitioner's conduct on January 30 testified to the facts already outlined.

The defense presented as a witness a so-called vexillologist.* Through him, efforts were made to introduce into evidence various contemporary uses in magazines and newspapers and on products of the "actual design of the United States flag and the stars and stripes pattern," including ties made of flag material, pants with a stars and stripes design, a footstool with a flag on the seat, and a bathing suit of flag design. This evidence was offered to assist the jury in determining whether the defendant's treatment of the flag was contemptuous by contemporary standards. Objections made by the Commonwealth to introduction of the foregoing were sustained by the trial judge.

The defense vexillologist testified that the flag the defendant was alleged to have been wearing conformed to official standards.

The trial judge refused the defendant's request that he instruct the jury that in order to find the defendant guilty they must find that the flag alleged to have been treated contemptuously was an official flag of the United States within the meaning of, and as defined by Executive Order number 10834, issued by the President of the United States pursuant to Title 4 United States Code, chapter one, section one, and set forth therein. (It is not entirely clear what instructions the judge gave. It would appear from page 2 of the Bill of Exceptions that he left it to the jury to determine what the term "flag of the United States" meant).

The jury returned a verdict of guilty and sentence was entered thereon.

---

* A word apparently denoting an expert on flags, from the Latin velum (cloth, sail, veil) and the word vexillum (a standard).

A timely Bill of Exceptions was thereafter prepared, and an amended bill allowed by the trial judge; and the petitioner's exceptions were heard by the Supreme Judicial Court. In its rescript opinion, the Court rejected the petitioner's "claim that the statute is on its face or as applied to him a restraint upon the right of freedom of speech guaranteed by the First Amendment." While the Court did not refer specifically in its opinion to the Fourteenth Amendment, it stated, "[W]e see no vagueness in the statute as applied here." The Court also ruled that rejection of the vexillologists's evidence as to contemporary use and treatment of the flag was not an abuse of discretion.

No contention is now made that the petitioner has not exhausted state remedies, nor that the constitutional issues presented here were not raised appropriately in state proceedings.

III

Flag cases have proliferated in the past several years. Most deal with situations carrying overtones of political protest. Others, like the present one, seem to stem more from the contemporary use of the national flag as an object of youth fashion and high camp: one sees the flag on ski-sweaters, shirts, hats, helmets, shopping bags, automobiles and jackets, often in conjunction with no discernible set of beliefs. These new, informal usages, at variance with traditional flag etiquette, add to the difficulty of interpreting older flag laws which, like the Massachusetts law, condemn one who treats the flag contemptuously, but do not define exactly what is meant.

In this case, two issues are uppermost. First, to what extent the Commonwealth of Massachusetts may constitutionally regulate conduct towards the flag of the United States. Second, if it may regulate such conduct, whether the penal statute under which the petitioner was convicted

is sufficiently limited in scope measured by the standards of the First and Fourteenth Amendments.[1A]

Both questions arise because, as is now generally agreed, many types of flag use and flag alteration are "symbolic expression".[2] Only as necessary to further a substantial or important governmental interest may the state curtail symbolic expression. See *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

In the recent flag cases, courts have identified two governmental interests as authorizing certain types of flag regulation.

One is the state's undoubted interest in preventing breaches of the peace.[3] However, that interest may be exercised only in narrowly drawn legislation directed towards conduct which, under the specific circumstances of the moment, may incite retaliation. See *Gooding* v. *Wilson*, 40 U.S.L.W. 4329 (U.S. Supreme Court, March 23, 1972). Unquestionably an insult to the national flag may sometimes threaten to provoke a breach of the peace. But often it may not. (In the present case, for example, there was no evidence that petitioner's conduct threatened a breach of the peace; and the Massachusetts statute does not require proof that a breach of the peace is imminent. Accordingly, a valid state interest sufficient to sustain the peti-

---

[1A] The most recent treatment of the constitutionality of a conviction for flag desecration by the Supreme Court is in *Street* v. *New York*, 394 U.S. 576 (1969), holding that contemptuous language directed at the flag could not be constitutionally punished under a state statute. The court left unresolved whether the state could punish flag burning.

[2] *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970). *Hoffman* v. *United States*, 445 F.2d 226 (D.C. Cir. 1971). *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970). *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971). *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970). *Sutherland* v. *DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971). *Thoms* v. *Smith*, 334 F. Supp. 1203 (D. Conn. 1971).

[3] *People* v. *Lindsay*, Ill. Sup. Ct. 3/30/72, reported at 11 Cr. L. 2090-1. See *Thomas* v. *Smith*, supra, 1211.

tioner's conviction cannot be premised upon the state's authority to prevent breaches of the peace.)

A broader, and, I think, more pertinent ground for flag legislation is to be found in the state's interest in preventing the desecration of our symbol of national unity. The flag reflects the common ideal which binds us together. It stands for no particular ideology other than the general loyalty and patriotism of all citizens. That loyalty and patriotism may be expressed in dissent as well as in agreement with the majority. To require one not to mutilate or defile the flag is merely to require him to refrain from physically insulting a symbol venerated by the vast majority of his countrymen. The state may exercise some degree of control over shocking conduct, at least where the "shock effect" stems from physical acts remote from the articulation of ideas. See *Street* v. *New York*, 394 U.S. 576, 592-593 (1969).

In any event, a state, in my view, has an interest sufficient to justify a statute narrowly drawn to prohibit mutilating, desecrating, or otherwise physically damaging the flag.[4]

Such a narrowly drawn statute was upheld in *Hoffman* v. *United States*, supra, 445 F.2d 226. The Court of Appeals for the District of Columbia approved the federal flag desecration statute (18 U.S.C. §700), but took pains to interpret its language so as to prohibit only acts of physical desecration and mutilation visited directly upon the flag itself. The court said, at 228,

> The right of symbolic expression of opinion, not excluded from the protection of the First Amendment, is involved in this case .... It follows that in order for this statute to avoid possible conflict with the

[4] *Hiett* v. *United States*, 415 F.2d 664 (5th Cir. 1969). *People* v. *Cowgill*, 78 Cal. Rep. 853 (1969); appeal dismissed, *Cowgill* v. *California*, 396 U.S. 371 (1970).

Amendment, the curtailment of expression goes no further than the language of the statute clearly requires. The legislative history of the federal act, enacted in 1968, was found to show a Congressional intention to condemn only the physical dishonor or destruction of the flag. The narrow language was said to be deliberate, to take account of Supreme Court decisions expanding the scope of First Amendment protections since the decision in *Halter* v. *Nebraska*, 205 U.S. 34 (1907).[5]

While courts have tended to sustain statutes punishing physical desecration of the flag, they have in recent years taken a different view of older state statutes which, like the Massachusetts flag statute, go well beyond prohibiting physical mutilation and destruction.

These latter typically contain language making it a crime to cast contempt upon the flag by word or deed (*Crosson* v. *Silver*, supra; *Parker* v. *Morgan*, supra; *Hodsdon* v. *Buckson*, supra; cf. *Sutherland* v. *Dewulf*, supra) or to "misuse" the flag (*Thoms* v. *Smith*, supra). The strong tendency in recent federal decisions is to hold that such statutes are overbroad, in that they improperly attempt to regulate mere verbal insults directed at the flag, nonverbal insults of a like nature, and breaches in flag etiqette. As the three-judge district court said in *Parker* v. *Morgan*, supra, 322 F. Supp. at 589, 590:

> Protection of the flag, qua flag, is one thing. To go further and forbid expression of attitudes by a gesture or even facial expression is quite another... The right of protest includes the right to be derisive, disdainful, contemptuous, and even defiant of government and what may be thought to be in a given context its symbols of authority.
>
> * * * * *

[5] In the *Hoffman* case, the court held that the defendant had not violated the federal act by wearing a shirt resembling the flag.

> We do not doubt the right of a citizen, however misguided, to turn thumbs down at the flag, or stick out his tongue, or salute it with a clenched fist, or otherwise express his derision and contempt for what to him it may represent. (footnote omitted)
>
> We think the line must be drawn at the point of contemptuous physical contact with the clearly defined flag and that physical protection of the flag itself is the outermost limit of the state's legitimate interest.

There is, I believe, much practical good sense in an accommodation which recognizes the state's right to regulate physical desecration while declining to permit it to enter the murky area where speech and attitudes are far more involved.

Focusing upon whether the Massachusetts statute is sufficiently limited in scope so as not to prohibit constitutionally protected conduct, it would seem apparent from what has already been said that it presents serious difficulties. Even if petitioner's silly conduct might be punished under a more narrowly drawn flag statute,

> the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Gooding* v. *Wilson*, 40 U.S.L.W. at 4330 (U.S. Supreme Court, March 23, 1972).

As already stated, the Massachusetts statute does not merely punish acts of contempt towards the flag which threaten to cause a breach of the peace. It punishes anyone who publicly treats contemptuously the flag regardless of surrounding circumstances.[6]

---

[6] In any event, there was no evidence of a threatened breach of the peace in this case. The evidence shows only that the people near the petitioner were laughing.

Nor does the Massachusetts statute (in contrast to the federal statute) merely punish those acts of contempt amounting to physical mutilation, defacement, burning or the like. Rather, it punishes anyone who "publicly . . . treats contemptuously" the flag.

The statutory language, on its face, condemns a spectrum of expression and conduct much of which the First Amendment, as it is now interpreted, protects. See *Gooding* v. *Wilson*, supra.

The words "treats contemptuously" can reasonably be read to permit prosecution for verbal insults to the flag, and non-verbal insults, such as turning thumbs down or sticking out one's tongue at the flag. However, the state, under the First Amendment, lacks the power to punish such actions. *Street*, supra; see *Parker*, supra.

In addition (especially these days when flags are commonly displayed on hats, garments and vehicles), the words "treats contemptuously" do not provide a readily ascertainable standard of guilt. The words leave conjectural, in many instances, what conduct may subject the actor to criminal prosecution. See *Papachristou* v. *City of Jacksonville*, 40 U.S.L.W. 4216 (February 24, 1972). It is not clear, for instance, to what extent they prohibit any public deviation from formal flag etiquette—for example, a failure to remove one's hat when the flag passes. At least until recently, the unauthorized display of the flag on a jacket would have been regarded by many as contemptuous. Is such conduct today contemptuous within the meaning of the statute? Would it be a violation of the statute to sew the flag on one's pants leg or jacket? Is the statute violated if the flag is flown in a position subordinate to the United Nations flag? (*Hodsdon* v. *Buckson*, supra, at 535.) Is a flag worn on a shirt by a veteran permissible, but a flag worn upside down on a shirt by a yippie or a peace marcher contemptuous? Do the attitude and politics of

the person wearing the flag determine whether its display is contemptuous? If so, would not the statute punish attitudes and views rather than specific conduct?

As worded, the statute sets "a net large enough to catch all possible offenders," leaving it to the police and the courts to pick and choose whom to prosecute and convict. *Papachristou* v. *City of Jacksonville*, supra. It may be said to encourage arbitrary and erratic arrests and convictions.

In *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970), the Court said, at 348,

> ... if there is a reading of a penal statute which authorizes local law enforcement officers to prosecute traditional First Amendment activity, such a statute is unconstitutionally over broad, despite the fact that the statute may also purport to prosecute activity not entitled to constitutional protection ...

An overly-broad and vague statute permits selective law enforcement. It "leaves wide open the standard of responsibility, so that it is easily susceptible to improper application." *Gooding* v. *Wilson*, supra, at 4332.

The present statute may have been little used in borderline cases. The good sense of Massachusetts law enforcement authorities has doubtless, on most occasions, been a sufficient shield against its abuse. But G.L. c. 264, §5 can

> withstand . . . attacks upon its facial constitutionality only if, as authoritatively construed by [the state] courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments . . . *Gooding* v. *Wilson*, supra, at 4330.

No such authoritative construction by a state court exists.

I conclude that the petitioner's conviction was under a statute with applicable provisions so encompassing and vague as to violate the First and Fourteenth Amendments.

Accordingly, an order is to be entered that the writ of habeas corpus issue and that the petitioner be released from the defendant's custody.

(s) LEVIN H. CAMPBELL
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 72-22-LC

VALARIE GOGUEN
PETITIONER
v.
JOSEPH SMITH
RESPONDENT

ORDER AND JUDGMENT

June 13, 1972

CAMPBELL, D.J.

In accordance with the Memorandum and Opinion filed May 25, 1972,

It is Ordered that the sentence imposed upon petitioner, Valarie Goguen, by the Superior Court of the Commonwealth of Massachusetts for Worcester County be vacated, and that he be discharged from such sentence, said vacation of sentence and discharge to take effect seven (7) days after the date of entry of this Order and Judgment.

(s) LEVIN H. CAMPBELL
United States District Judge

Dated June 13, 1972

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
[Caption Omitted in Part]

NOTICE OF APPEAL

Now comes the respondent and, by his attorney, appeals from the memorandum and opinion of the Court entered on May 25, 1972 and also appeals from the order and judgment of the Court entered on June 13, 1972.

By respondent's attorney:
ROBERT H. QUINN
Attorney General
(s) CHARLES E. CHASE
CHARLES E. CHASE
Assistant Attorney General

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1204

VALARIE GOGUEN,
PETITIONER, APPELLEE,
v.
JOSEPH SMITH, as he is Sheriff of Worcester County,
RESPONDENT, APPELLANT.

DOCKET ENTRIES

1972

June 16 Record on appeal in one volume filed and case docketed.

22 Appearance of Evan T. Lawson for appellee filed.
Appearance of Charles E. Chase for appellant filed.

26 Statement and designation filed.

1972

July 21 Brief for appellant and appendix in one volume filed.

Aug. 10 Brief for appellee filed.

24 Assigned for hearing at the September, 1972, session.

Sept. 7 Heard before Coffin, Ch.J., and McEntee and Hamley, JJ.

Dec. 14 Judgment: The judgment of the district court is affirmed. Opinion of the Court by Coffin, Ch.J., and concurring opinion by Hamley, J. Notices mailed.

1973

Jan. 4 Mandate issued; copy filed. Taxation of costs filed. Original papers returned to the district court.

29 Notice of appeal filed.

Mar. 26 Notice from Supreme Court of filing a petition for certiorari (3/14/73) (72-1254) filed.

The Opinion of the United States Court of Appeals for the First Circuit can be found at pages 21 through 50 of the Jurisdictional Statement previously filed in this Court.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1204

VALARIE GOGUEN,
PETITIONER, APPELLEE,
v.
JOSEPH SMITH, as he is Sheriff of Worcester County,
RESPONDENT, APPELLANT.

JUDGMENT

Entered: December 14, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1204

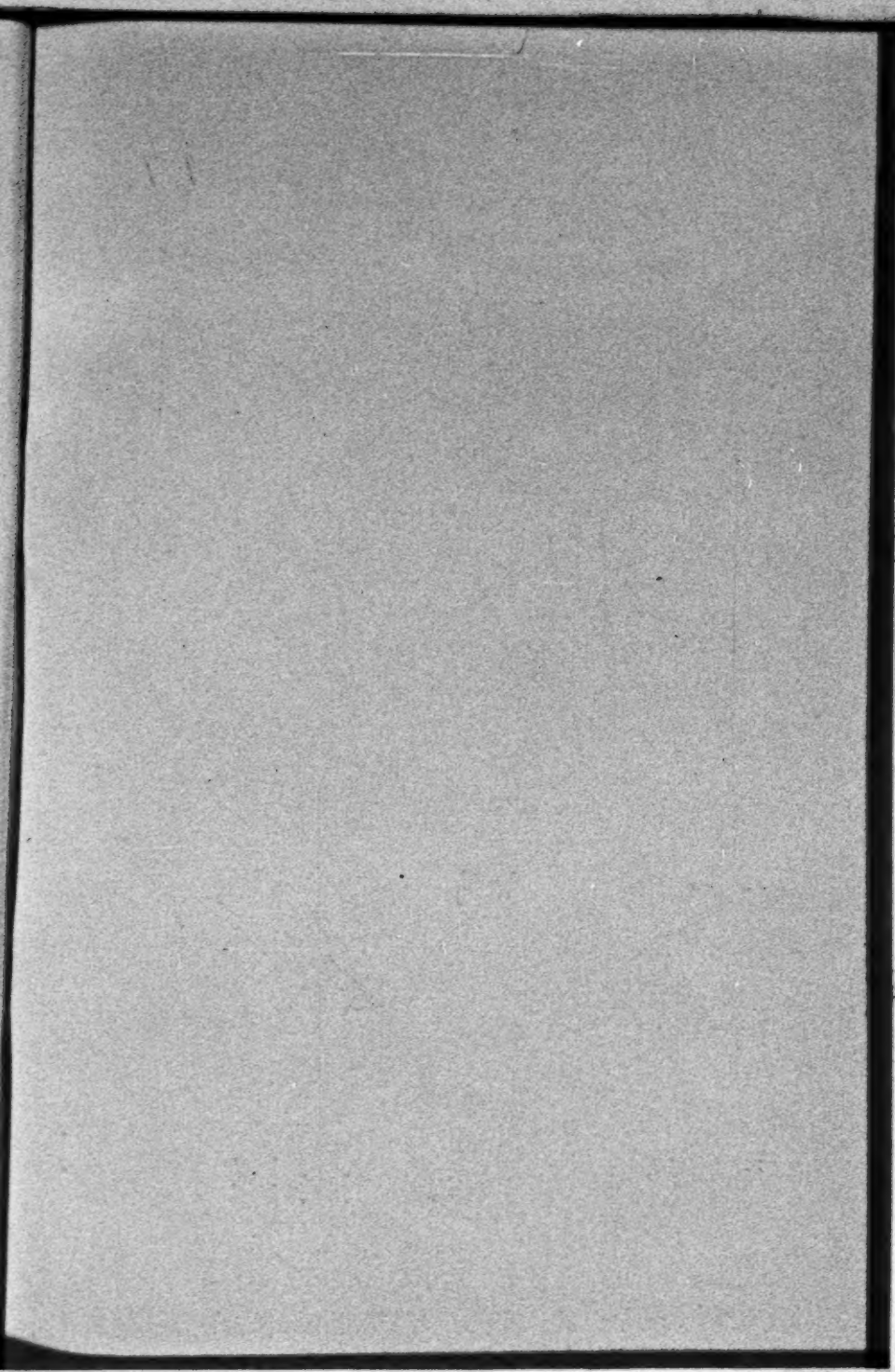
VALARIE GOGUEN,
PETITIONER, APPELLEE,
v.
JOSEPH SMITH, as he is Sheriff of Worcester County,
RESPONDENT, APPELLANT.

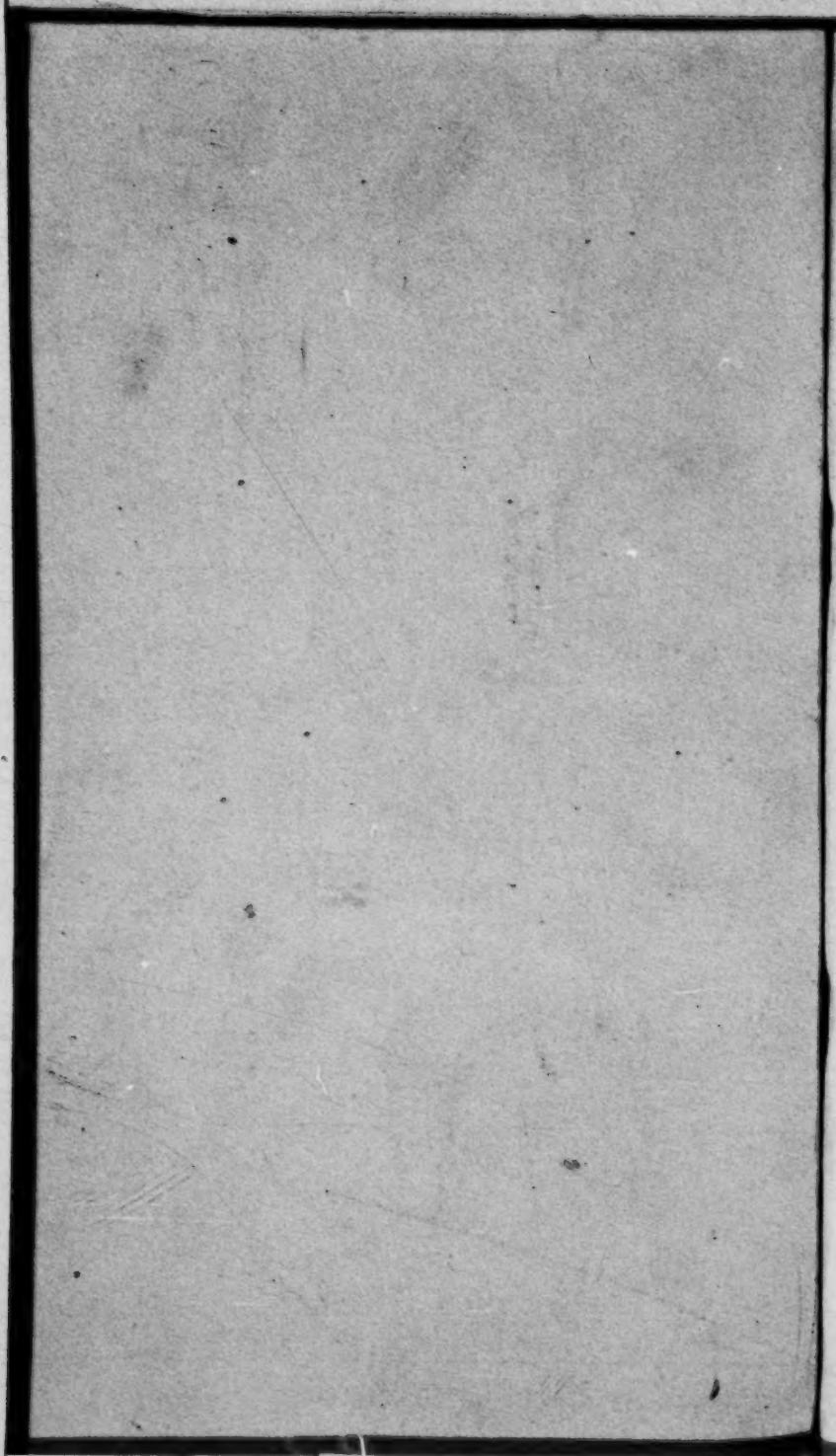
NOTICE OF APPEAL

Notice is hereby given that Joseph Smith, respondent-appellant above named, hereby appeals to the United States Supreme Court from the judgment entered in this action on the fourteenth day of December, 1972.

By Respondent-Appellant's Attorney,
ROBERT H. QUINN
Attorney General

(s) _____
CHARLES E. CHASE
Assistant Attorney General





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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1254

JOSEPH SMITH, SHERIFF OF
WORCESTER COUNTY,
APPELLANT,

v.

VALERIE GOGUEN,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

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JOHN J. IRWIN, JR.
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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No.

JOSEPH SMITH, SHERIFF OF WORCESTER COUNTY,

APPELLANT,

v.

VALERIE GOGUEN,

APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Court of Appeals for the First Circuit, entered on December 14, 1972, declaring Massachusetts General Laws, chapter 264 §5 unconstitutionally vague and overbroad, and affirming the reversal of appellee's state court conviction pursuant to said statute. Appellant submits this Statement to show that the Supreme Court of the United

States has jurisdiction of the appeal and that a substantial federal question is presented.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is not yet reported and is included herein as Appendix A. The opinion of the United States District Court for the District of Massachusetts is reported at 343 F. Supp. 161 (D. Mass. 1972). The opinion of the Massachusetts Supreme Judicial Court (*sub. nom. Commonwealth* v. *Goguen*) is reported at 1972 Mass. Adv. Sh. 303, 279 N.E.2d 666 (1972), and is included herein as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit affirming the granting of a writ of habeas corpus was entered on December 14, 1972. A timely notice of appeal to this Court was filed on January 29, 1973. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(2).

Question Presented

Whether the Court of Appeals erred in finding the Massachusetts "flag statute", on its face, to be impermissibly vague in violation of the Fourteenth Amendment and overbroad in violation of the First Amendment.

Statute Involved

At the time of the offense charged in this case, Mass. Gen. Laws, ch. 264 §5, read:

"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag. Notwithstanding the foregoing, there may be attached to the staff bearing a flag of the United States or of Massachusetts belonging to an organization of veterans of the Civil War, to a camp of the United Spanish War Veterans, to a post or department of The American Legion, or to a post or department of the Veterans of Foreign Wars of the United States, or to

a post or department of the Jewish War Veterans of the United States, or to a camp or department of the Sons of Union Veterans of the Civil War, or to a barracks or department of the Veterans of World War I of the U. S. A., or belonging to or used in the service of the United States or the commonwealth, a streamer having inscribed thereon the names of battles and the name and number of the organization to which such flag belongs. For the purposes of this section, a flag shall be deemed to continue to belong to any organization of veterans hereinbefore specified, although such organization has ceased to exist, during such time as it remains in the lawful ownership or custody of any other of the aforesaid organizations or of the commonwealth or of any political subdivision thereof, or of any patriotic or historical society incorporated under the laws of the commonwealth or determined by the adjutant general to be a proper custodian thereof."

Statement

A criminal complaint was brought in the District Court of Leominister, Massachusetts, on January 31, 1970, which charged that the appellee did publicly treat contemptuously the flag of the United States in violation of Mass. Gen. Laws, ch. 264, §5. After being found guilty in the District Court appellee appealed for a trial *de novo* in the Worcester County Superior Court.

The relevant evidence presented during the Superior Court jury trial was as follows: On January 30, 1970, a police officer observed the appellee standing with a group of persons on Main Street in Leominster. Appellee had a cloth American flag, approximately 3 x 5 or 4 x 6 inches, sewn onto his pants in the buttocks area. When the police officer questioned the appellee about the flag, the other

people present were laughing. Another police officer observed the appellee walking in the downtown business district of Leominster with an American flag sewn onto his pants in the buttocks area.

The jury returned a verdict of guilty and the appellee received a sentence of six months in the House of Correction. On appeal, the Massachusetts Supreme Judicial Court affirmed the conviction in a rescript opinion. *Commonwealth* v. *Goguen*, 1972 Mass. Adv. Sh. 303, 279 N.E.2d 666 (1972).

On February 23, 1972, appellee filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. By agreement, the parties presented the record that was before the Massachusetts Supreme Judicial Court to the District Court; no other evidence was taken. Judgment granting the writ of habeas corpus was entered on June 13, 1972. Appeal was taken.

On December 14, 1972, the Court of Appeals for the First Circuit affirmed the judgment of the District Court having found that the Massachusetts "flag statute" was, on its face, unconstitutionally vague and overbroad. A timely notice of appeal was filed on January 29, 1973.

The Questions Are Substantial

I. The Court Below Improperly Allowed Appellee to Challenge the Statute as Being Vague on its Face and, Once Allowing the Challenge, Improperly Found the Statute Impermissibly Vague on its Face.

A. The United States Court of Appeals for the First Circuit "allowed" appellee to mount a challenge against the Massachusetts flag statute as being unconstitutionally vague on its face. (App. A). This is surprising since appellee never pressed an argument in the Massachusetts

Supreme Judicial Court that the statute was unconstitutionally vague on its face. The term "vague" appears but *once* in the *record* on appeal before the Massachusetts Supreme Judicial Court, to wit:

> "The [appellee] filed a Motion to Dismiss the Complaint on the ground that G.L. c. 264 §5 is unconstitutional on its face and as applied to him in that it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Part I Article 12 of the Declaration of Rights in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials." (Appellee's Amended Bill of Exceptions).

At first glance, it might appear that appellee intended to include in his argument to the Supreme Judicial Court that the statute was vague on its face. But a review of appellee's brief, filed in support of his amended bill of exceptions, reveals no such argument. Appellee never argued in his state court brief that the flag statute was impermissibly vague on its face.

Rule 1:13 of the Massachusetts Supreme Judicial Court reads in relevant part:

> "The court need not pass upon questions or issues not argued in briefs. Nothing argued in a brief shall be deemed to be waived by a failure to argue orally."

The Court frequently resorts to this rule when an issue is not fully argued in a protagonist's brief. *Commonwealth* v. *Roberts*, 1972 Mass. Adv. Sh. 1477, 1487-88, 285 N.E.2d.

919, 926 (1972); *Lindahl* v. *Sullivan*, 1972 Mass. Adv. Sh. 645, 281 N.E.2d 231, 232 (1972); *Blais* v. *Quincy Mutual Fire Ins. Co.*, 1972 Mass. Adv. Sh. 195, 196, 278 N.E.2d 746, 747 (1972); *Commonwealth* v. *White*, 1970 Mass. Adv. Sh. 1651, 1654, 265 N.E.2d 473, 475 (1970); *Commonwealth* v. *Wilson*, 355 Mass. 441, 443 (1969). An advocate has to do more than just state the issue in his brief; he must argue it. *Blais* v. *Quincy Mutual Fire Ins. Co.*, *supra* at 645, 278 N.E.2d at 747. Moreover, when an issue is not fully briefed, the Court will treat the issue as *waived* even though the issue may be based upon "constitutional considerations." *Commonwealth* v. *Roberts*, *supra* at 1487-88, 285 N.E.2d at 926 (alleged denial of equal protection of the laws); *Commonwealth* v. *White*, *supra* at 1654, 265 N.E.2d at 475 (allegation of double jeopardy). Thus, the First Circuit's conclusion (App. A p. 24) that the Massachusetts Supreme Judicial Court "assume[d that] there was no vagueness [in the statute] as applied to appellee" is inaccurate. The Massachusetts Court simply applied the terms of the statute to appellee's conduct and found no vagueness (App. B p. 51). Since appellee did not articulate anything further in the nature of "vagueness", the Court did no more.

The very wording of the Supreme Judicial Court opinion (App. B p. 51), to wit:

> "Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here."

should have been enough to impress upon the First Circuit Court that appellee had not challenged the statute as being vague *on its face*. Accordingly, the First Circuit should not have entertained a facial challenge on the basis of vagueness because of the doctrine of exhaustion of

state remedies. See 28 U.S.C. §2254(b); *Picard* v. *Connor*, 404 U.S. 270 (1971).

The construction and interpretation of state statutes are exclusively state court functions. See, e.g. *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941); *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163-164 (1943); *Younger* v. *Harris*, 401 U.S. 37, 52 (1971). Since it is obvious that the Massachusetts Supreme Judicial Court did not analyze the statute in light of a claim that the statute was impermissibly vague *on its face*, the First Circuit Court should have inquired, "Why?" — rather than blithely concluding that the Massachusetts Court incorrectly refused to address itself to that issue.

Delicate federal-state relations are certainly subject to an unnecessary strain if a state court is denied the initial opportunity to construe the enactments of its legislature in the light of a *specific* constitutional challenge. Nothing in the record before the First Circuit Court indicated "either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." See 28 U.S.C. §2254(b).

The "exhaustion doctrine" was and is fully applicable to this case.

It is submitted that the First Circuit Court impermissibly exteneded the scope of review in a federal habeas corpus proceeding. In reaching the allegation that the statute was vague *on its face*, the First Circuit apparently treated this claim as "plain error." It is, of course, the federal rule that "[P]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. Rules Crim. Proc. 52(b). Of course, . . . "[T]he whole history of the writ — its unique development — refutes a construction of the federal courts' habeas corpus powers that would

assimilate their task to that of courts of appellate review." *Townsend* v. *Sain*, 372 U.S. 293, 311 (1963).

Certainly, no particular form of words or phrases is essential to raise a constitutional issue. The only requirement being that the claim and the ground therefor be brought to the attention of the state court with *fair precision*. This minimum standard was not met in this case.

It is submitted the First Circuit Court erred in reviewing a claim that was not raised in or decided by the Massachusetts Supreme Judicial Court.

B. Assuming, *arguendo*, that the First Circuit Court could properly reach a claim that the flag statute was impermissibly vague on its face, it is submitted that the Court wrongly decided that issue.

It is significant that the First Circuit Court, in finding the Massachusetts statute vague on its face, relied heavily upon three recent decisions of this Court both as to appellee's standing to challenge the statute on its face and as to the legal principles applicable. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) involved a vagrancy ordinance; *Colten* v. *Kentucky*, 407 U.S. 104 (1972) addressed itself to a subdivision of the state's disorderly conduct statute; and *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972) dealt with an antinoise ordinance. The *subject matter* covered by each of these statutes is by its very nature both broad and indefinite. However, application of the subject matter of the statute to a "particular context" can do much to eliminate claims of facial vagueness.

> "Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about

> to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." (footnote omitted). *Grayned* v. *City of Rockford, supra,* at 112.

The Rockford antinoise ordinance was upheld. The Jacksonville vagrancy ordinance did not withstand constitutional scrutiny. Of course it was impossible to put the Jacksonville ordinance into a "particular context". Mr. Justice Frankfurter's dissent in *Winters* v. *New York,* 333 U.S. 507 (1948) is apposite (at p. 540):

> "Only a word needs to be said regarding *Lanzetta* v. *New Jersey,* 306 U.S. 451. The case involved a New Jersey statute of the type that seek to control "vagrancy." These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in *by the text of the statute or by the subject matter* so as to give notice of conduct to be avoided." (Emphasis supplied).

Certainly, the subject matter of the Massachusetts flag statute is much narrower than that involved in either *Papachristou, Colten* or *Grayned,* Additionally, it is clear that the conduct the Massachusetts statute seeks to pen-

alize necessarily must occur in a "particular context" — i.e., conduct that touches the physical integrity of the United States flag.

The First Circuit Court apparently felt that since the Massachusetts Supreme Judicial Court disposed of appellee's case in a rescript opinion, it could totally ignore the state court opinion. On the issue of whether the statute was vague as applied to appellee, the Supreme Judicial Court cited favorably an opinion of the Massachusetts Attorney General.[1] The Attorney General's opinion reinforces our contention that the subject matter of the statute is confined to the *flag* of the United States and does not address itself to emblems or articles that might be said to be *similar to* the flag. Compare *Long Island Vietnam Moratorium Comm.* v. *Cahn*, 437 F.2d 344, 350 (2nd Cir. 1970) *cert. den.* 400 U.S. 956. This interpretation was made more explicit when the Massachusetts legislature *added* the following sentence to the statute on August 12, 1971:

> For the purposes of this section the term "flag of the United States" shall mean any flag which has been designated by Act or Resolution of the Congress of the United States as the national emblem, whether or not such designation is currently in force.

The foregoing addition to the statute was made subsequent to the conduct at issue in this case and prior to the Supreme Judicial Court opinion. It is not contended that this amendment has applicalion to appellee's case. See *Grayned* v. *City of Rockford*, *supra* at 107, ft. 2. It is contended that the amendment clarifies what was already implicit in the statute.

Besides the narrow subject matter of the Massachusetts

[1] This opinion made up a part of the record before the First Circuit and can be found as Appendix C of this jurisdictional statement.

statute it is clear that the Supreme Judicial Court has construed it such that the prosecution must prove "culpable intent as a necessary element of the offense . . ." *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 342 (1952). The requirement that culpable intent must be proven to establish a violation of the statute does much to overcome the First Circuit's conclusion of facial vagueness.

> "The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. [citation omitted]. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945).

The Supreme Judicial Court's citation in the rescript to *Commonwealth* v. *Williams*, 312 Mass. 553, 557 with its instruction to compare *Smith* v. *California*, 361 U.S. 147, 152 shows that "culpable intent" must be proven to establish a violation of the statute.

In addition to the narrow subject matter of the statute

and the necessity of proving culpable intent, other means show how to "extrapolate its allowable meaning." *Garner* v. *Louisiana*, 368 U.S. 157, 174 (1961) (Frankfurter, J. concurring).

> Here, we are "relegated . . . to the words of the ordinance itself," to the interpretations the [state court] has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. *Grayned* v. *City of Rockford*, 408 U.S. at 110. (citations omitted).

The First Circuit found the statutory words "treats contemptuously" to be impermissibly vague. Certainly that phrase is not as specific as "mutilates, tramples upon [or] defaces" — the words preceding "treats contemptuously."

The following principle of statutory interpretation was pressed upon First Circuit by the appellant (without success): when general and specific words are associated with each other, they take "color" from each other such that the general words are restricted to a sense analogous to the more specific. See *State* v. *Kasnett*, 30 Ohio App. 2d 77, 283 N.E.2d 636, 645 (1972) (Stephenson, J. concurring) (individual convicted under Ohio "flag statute" for wearing flag on buttocks).

When the Supreme Judicial Court has been presented with challenges to the facial constitutionality of analogous state statutes, it has taken pains to construe statutory language narrowly in order to protect constitutional rights. Thus, in *Alegata* v. *Commonwealth*, 353 Mass. 287 (1967), the Supreme Judicial Court ruled that a statute, allowing the police to arrest suspicious persons in the night time who do not give a satisfactory account of themselves, was void for vagueness; ruled that a statute punishing idle per-

sons who not having visible means of support, live without lawful employment was void for vagueness; ruled that a statute punishing whoever roves about from place to place living without labor or visible means of support was void for vagueness; and ruled that a statute punishing as vagabonds known thieves who act in a suspicious manner in designated places was void for vagueness. In the same case, the Court upheld the "disorderly conduct" statute. *Commonwealth* v. *Alegata, supra, at* 302-304. The Court construed the statutory language narrowly and gave it the same meaning as given to the concept of "disorderly conduct" by Section 250.2 of the Model Penal Code (Proposed Official Draft), even though that definition was obviously not available to the legislature when the statute was originally enacted in 1943.

In *Thomas* v. *Commonwealth,* 355 Mass. 203, 206-207 (1969), the Court upheld the "definiteness" of the phrase "common night walkers" by construing it to apply only to persons abroad at night soliciting people to have illicit sexual intercourse. And in *Commonwealth* v. *Jarrett,* 1971 Mass. Adv. Sh. 833, 838-840, 269 N.E.2d 657 (1971), the Court found that the "disturbers of the peace" statute passed constitutional muster. In construing the statute the Court stated (at p. 840):

> "The mere making of statements, or expressing of views of opinions, no matter how unpopular, or views with which persons present do not agree, has never been and is not now punishable as a disturbance of the peace under the law of the Commonwealth."

See also *Commonwealth* v. *Brasher,* 1971 Mass. Adv. Sh. 907, 270 N.E.2d 389 (1971).

It is submitted that since the subject matter of the Massachusetts flag statute is inherently narrow, since it

is necessary to prove culpable intent to establish a violation of the statute, and, since there are several other indicia in Massachusetts law evidencing a specific meaning to the statute for those people who desire to obey it [*Colten* v. *Kentucky*, 407 U.S., at 110], the statute is not impermissibly vague. To paraphrase *Grayned, supra* at 113: the vagueness of the phrase "treats contemptuously" is dispelled by the statute's requirements (1) that the contemptuous treatment of the United States flag be direct and immediate; and (2) that the treatment be wilfully done.

II. Since the Statute Furthers an Important State Interest Which Is Unrelated to the Suppression of Speech, It Does Not Suffer From Overbreadth.

The First Circuit Court opined that the flag of the United States was such a "primary symbol" that "any individualized activity with regard to it . . . [was] bound to convey a message of fealty or revulsion . . . ." (App. A p. 38). Since the Court found that *all acivity* involving the flag has a central and encompassing "communicative content", it concluded that "flag activity" is closely akin to pure speech and is therefore protected by the First Amendment. (App. A pp. 38-39).

Indeed, the First Circuit's opinion effectively does away with any and all "flag statutes" as being inherently unconstitutional. For that Court, the only forseeable time that flag desecration would give rise to a criminal prosecution, would occur when the desecration resulted in a breach of the peace. (App. A p. 43). Even then, the prosecution would rest upon a "breach of the peace" statute rather than a "flag" statute.

The Massachusetts Supreme Judicial Court rejected the syllogism that all "flag activity" is "speech" and there-

fore is protected by the First Amendment. Other courts have likewise rejected that proposition. *Joyce* v. *United States*, 454 F.2d 971 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 969 (1972) (federal statute); *United States* v. *Crosson*, 462 F.2d 96 (9th Cir. 1972) (federal statute); *Sutherland* v. *DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971) (Illinois statute); *Oldroyd* v. *Kugler*, 327 F. Supp. 176 (D.N.J. 1970) (New Jersey statute); *People* v. *Cowgill*, 78 Cal. Rptr. 853 (1969), app. dismissed 396 U.S. 371 (1970) (California statute); *State* v. *Kasnett*, 30 Ohio App.2d 77 (1972) (Ohio statute).

In *Street* v. *New York*, 394 U.S. 576 (1969), at least four justices of this Court recognized that the states could validly enact penal statutes regulating the use of the flag. Mr. Justice Black expressed it in part this way (*Street, supra* at 610):

> It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). In my view this quotation from the *Giboney* case precisely applies here. The talking that was done took place "as an integral part of conduct in violation of a valid criminal statute" against burning the American flag in public.

Assuming that this Court agrees that the states can enact legislation regulating the use of the flag the question

becomes: "Has the Massachusetts statute been drawn with proper specificity and/or been construed narrowly enough so as not to infringe upon constitutional rights?" The operative "desecration words" appearing in the first fifteen words of the statute, when given their ordinary dictionary meanings, have been construed by other courts faced with identical language as defining proscribed conduct with acceptable precision. *Joyce* v. *United States, supra,* at 982-985; *Oldroyd* v. *Kugler, supra,* at 177-179. Of course, the fact that the Massachusetts Supreme Judicial Court has construed the statute to mean that the prosecution must prove culpable intent as an element of the offense does much to restrict the "desecration" words of the statute. And certainly the words "treats contemptuously" take on more "color" and specificity when read in association with the other "desecration" words.

The Massachusetts Court has recognized that pure speech directed at the flag, no matter how "defiant or contemptuous", is protected by the First Amendment. See *Street* v. *New York, supra,* at 593. It has shown itself ready to weigh interests of free speech against the asserted state interest in enacting the statute. In this case the Court found appellee's "communication, if any, . . . thoroughly inarticulate." (App. B p. 51). It is submitted that the "desecration" words of the statute proscribe acts that touch upon the physical integrity of an actual flag of the United States. Such a procription is not overly broad.

Moreover, the Massachusetts statute limits the definition of "flag" to an actual flag of the United States. The phrase "any representation [of the flag]" which appears in following clauses of Mass. Gen. Laws, ch. 264 §5 does not appear in the first fifteen words of the statute. As stated, the first fifteen words of the statute are limited to acts that touch the integrity of an *actual flag* of the United

States. Compare the language of the Massachusetts statute with the language of New York's statute, *Long Island Vietnam Moratorium Comm.* v. *Cahn*, 437 F.2d 344, 345 ft. 1 (2nd Cir. 1970), *cert. den.* 400 U.S. 956, with the language of North Carolina's statute, *Parker* v. *Morgan*, 322 F. Supp. 585, 586 ft. 1 (W.D. Caro. 1971) and with the language of Arizona's statute, *Crosson* v. *Silver*, 319 F. Supp. 1084, 1086 (D. Arizona 1970). The statutes of the just-mentioned three states were all found to be overly broad in the above-cited opinions. But each of those state statutes make the operative "desecration words" in the statute, i.e., mutilate, deface, etc., apply not only to an actual flag of the United States but also to any standard, color, ensign, etc.

Obviously the Massachusetts statute is much more narrowly drawn since the "desecration words" in the Massachusetts statute are limited to actual flags of the United States. The remaining sections of the Massachusetts statute that employ the phrase "any representation [of the flag]" are directed towards commercial uses of the flag. See *Halter* v. *Nebraska*, 205 U.S. 34 (1907).

The foregoing interpretation of the Massachusetts statute is confirmed by the aforementioned opinion of the Commonwealth's Attorney General (App. C p. 53). In that opinion, Attorney General Richardson stated that the display of a painting, resembling an American flag but where the stars had been replaced by a swastika, did not constitute a violation of ch. 264 §5 since the painting was not a representation of a flag of the United States. The Supreme Judicial Court cited this opinion of the Attorney General in the instant case as supporting the proposition that Mass. Gen. Laws, ch. 264 §5 does not suffer from vagueness. (App. B p. 51).

Additionally, the recently enacted federal flag-desecration statute (18 U.S.C. 700) is more broadly drawn than the Massachusetts statute since Section (b) defines "flag" as including any "standard, colors, ensign . . . or of any part or parts of either." Nevertheless no overbreadth in the federal statute was found in either *Joyce* v. *United States, supra; Hoffman* v. *United States,* 445 F.2d 226 (D.C. Cir. 1971) or *United States* v. *Ferguson,* 302 F. Supp. 1111 (N.D. Cal. 1969). Compare *People* v. *Alford,* 102 Cal. Rptr. 667, *cert. den.* 41 U.S.L.W. 3371 (January 8, 1973).

The Massachusetts statute does indeed further an important and substantial state interest. That interest is two-fold:

(1) its interest in the preservation of the public peace, and

(2) its interest in the preservation of the flag as a symbol of unity on national ideals and purpose.

See *Sutherland* v. *DeWulf,* 323 F. Supp., *supra* at 744-746; *State* v. *Kasnett,* 30 Ohio App. 2d 77, 283 N.E.2d 636, 640 (1972). There is nothing on the face of the statute indicating that it will unduly interfere with an individual's rights to possess and use a flag of the United States. Indeed, individuals who wish to exercise their constitutional right to assemble, to picket, to protest, etc., may still do so and may do so with use of the flag. The statute only prohibits acts which touch and physically dishonor the flag. It is not overbroad.

Conclusion

For the reasons stated above, it is respectfully submitted that the question presented on appeal is substantial and is of public importance. It is therefore respectfully sub-

mitted that this Court should note probable jurisdiction, and set the matter for argument.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1204.

VALARIE GOGUEN,
PETITIONER, APPELLEE,
v.
JOSEPH SMITH,
SHERIFF OF WORCESTER COUNTY,
RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*, and
HAMLEY*, *Senior Circuit Judge*.

Charles E. Chase, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellant.
Evan T. Lawson, with whom *C. Michael Malm* was on brief, for appellee.

December 14, 1972.

COFFIN, *Chief Judge*. Appellee was sentenced to six months in the House of Correction after having been convicted by a jury in a Massachusetts Superior Court[1] for "publicly treat[ing] contemptuously the flag of the United States", in violation of Mass. Gen. Laws ch. 264

* Of the Ninth Circuit, sitting by designation.

[1] A prior trial before a Massachusetts District Court judge resulted in a finding of guilty and imposition of a one-year jail sentence. Thereupon, appellee exercised his right to a *de novo* jury trial.

§ 5.[2] The treatment found contemptuous consisted of appellant appearing in the business district of Leominster, displaying a small cloth American flag sewn to his blue jeans on the area covering his left buttock. When a police officer questioned appellee, persons with whom appellee was standing were amused. Appellee was arrested the day after this incident. The Massachusetts Supreme Judicial Court affirmed the conviction in a rescript opinion, *Commonwealth* v. *Goguen*, 1972 Mass. Adv. Sh. 303, 279 N.E.2d 666, finding the statute not vague as applied to appellee, whatever might be the uncertainties in other circumstances, and neither a facial nor "as applied" restraint upon freedom of speech. Appellee then petitioner for a writ of habeas corpus in the federal district court, which issued the writ after finding that the statute was both vague, in violation of the Fourteenth Amendment, and overbroad, in violation of the First Amendment. *Goguen* v. *Smith*, 343 F.Supp. 161 (D. Mass. 1972). The Commonwealth appeals.

The Commonwealth first contends that the questions of facial vagueness and overbreadth should not be considered, placing principal reliance on the well-known abstinence prescription of *United States* v. *Raines*, 362 U.S. 17, 21 (1960) that "[one] to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."[3] and on *Colten* v.

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[2] "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . . shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both . . . ."

This statute, first enacted in 1899, remained the same insofar as its operative "desecration words" are concerned, until some time after the events here at issue took place.

[3] *Raines* was not a case involving vagueness, but rather an overbreadth attack in the sense that the statute was allegedly susceptible

Kentucky, 407 U.S. 104 (1972). Secondly, it specifically defends against the vagueness charge by pointing out that the statutory words "spell out design" and "describe conduct that affects the physical integrity of a flag of the United States". Finally, the Commonwealth supports its law against the overbreadth attack by arguing that the statutory "desecration words", being aimed at "protecting . . . physical integrity" are not speech-oriented; but that, if appellee be assumed to have been engaging in symbolic speech, the Commonwealth was furthering a substantial government interest, within its power, unrelated to suppression of expression, and no greater than essential to further that interest, thus meeting the requirements of *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968).

While the facts in this case are clear and simple, the legal issues are complex. This is so because concepts of vagueness and overbreadth are fraternal, not identical twins, having affinity but separate identities and purposes: because the preliminary question, "When may one complain?", requires a different analysis as to each concept; and because, as to the First Amendment challenge of overbreadth, we confront the question which Mr. Justice Harlan noted had been "pretermitted" in clearer cases, i.e., whether wearing a flag is symbolic speech. *Cowgill* v. *California*, 396 U.S. 371, 372 (1970) (concurring opinion). We shall order our analysis first by examining if appellee's non-First Amendment attack on the statute's facial vagueness may properly be considered, and then by proceeding to the merits of that attack. We shall then assess whether it is appropriate to subject the statute to a First Amendment overbreadth test, and continue with the detailed

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of unconstitutional applications to third persons. Many of the cases cited in *Raines* were similarly overbreadth cases, though at least *United States* v. *Wurzbach*, 280 U.S. 396 (1930) clearly refers to vagueness claims.

inquiries required by such a test. So, while the subject matter of this case is seat-of-the-pants, our analysis cannot be.

Vagueness in a Non-First Amendment Context

We first approach this case on the assumption that there are no First Amendment problems inhering in the statute or in appellee's conduct. The threshold question then becomes, whether appellee's conduct and the proscriptions of the statute are such that it is appropriate for a court to consider his facial challenge, in addition to his allegation that the law is vague as applied to him. The Commonwealth assumes there was no vagueness as applied to appellee, as did the Supreme Judicial Court. The unarticulated premise is that, whether or not the statute may be capable of unconstitutional applications in other situations, it is not vague as to one who sews a flag to the seat of his pants.[4]

Assuming, however, that the statute clearly covers appellee's conduct, we must determine whether a court may hear appellee's complaint that the statute is facially unconstitutional because others would not know whether their proposed conduct would constitute contemptuous treatment. Before *Raines*, an impressive series of cases considered vagueness attacks by looking solely to the text of the statute, without examining the offender's conduct,[5] some cases involving conduct clearly covered by a statute.[6]

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[4] Even if we were to accept the Commonwealth's interpretation in its brief that the statute proscribes only conduct affecting "the physical integrity of a flag", and were to assume that, so limited, it could validly be applied, we are not so sure that sewing a flag to a background clearly affects "physical integrity."

[5] *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *United States* v. *Spector*, 343 U.S. 169 (1952).

[6] *Czarra* v. *Board of Medical Supervisors*, 25 App. D.C. 443, 453 (1905) (cited in *Lanzetta*, *see* n. 3); *Screws* v. *United States*, 325 U.S. 91 (1944); *Champlin Refining Co.* v. *Commission*, 286 U.S. 210 (1932).

Raines, while stating that generally a person may not plead facial unconstitutionality of a statute that is constitutional as to him, noted none of these cases although it recognized a sizeable list of exceptions to its broad principle. Two of these exceptions are relevant to our present inquiry since their rationale supports the instant facial attack. Thus, where a statute has already been declared unconstitutional in a large number of its intended applications, and it appears that it was not intended to stand as valid in the few remaining fortuitous situations to which it might apply, *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913); or where a state court has declared valid one provision or application of a statute which is inextricably tied up with an invalid one, *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924)—in such circumstances the broad constitutional challenge may be mounted.[7] We read these exceptions as not depending upon the historic fortuity that a statute has already been subjected to such holdings but as depending upon the probability of such holdings invited by the wording of the statute. From the failure of *Raines* to cite the vagueness cases to which we have referred and in the light of the thrust of the foregoing two exceptions, we think the sense of the doctrine

[7] The other exceptions are "in the rarest of cases" where the Court determines that Congress would have wanted the statute to stand only if it could do so in all of its applications, clearly inapplicable to the state statute here, *but see* discussion *infra;* or where freedom of speech would be inhibited as to others, *Smith* v. *California*, 361 U.S. 147, 151 (1959); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940), a situation we have assumed does not exist here, *but see* discussion *infra*; or where the Court did consider the rights of third persons not parties to the litigation but that were impaired thereby because these persons had no effective way to preserve those rights themselves. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 439, 459-60 (1958); *Barrows* v. *Jackson*, 346 U.S. 249 (1953), *but see* discussion *infra*; or where, as a result of the litigation, a criminal statute would be necessarily revised and consequently would fail to give intelligible warning of the conduct it prohibited, *United States* v. *Reese*, 92 U.S. 214, 219-20 (1875).

is that if the nature of a party's conduct is not so dissimilar from other behavior sought to be proscribed by a statute, such that an interpretation distinguishing his behavior from that of others would not provide more certain notice to potential offenders and would also seem unwarranted in the light of a legislative determination to cover all such activities, then a void-for-vagueness challenge allows a court to rule on the facial constitutionality of that statute. *See* R. Sedler, *Standing to Assert Constitutional Jus Tertii in The Supreme Court*, 71 Yale L. J. 599, 608 (1962).

We are confirmed in this view by recent decisions of the Supreme Court.[8] In *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), numerous parties who had been prosecuted under a city vagrancy ordinance prevailed in their contentions that the law was void for vagueness. Among those permitted to challenge the ordinance on its face was a defendant who had been charged with "disorderly conduct—resisting arrest with violence". Similarly, in *Colten* the Court entertained a void-for-vagueness claim against a state "disorderly conduct—refusing to disperse" statute which clearly applied to the offender. Although the claim was rejected, the Court specifically agreed with the state court determination that the law was not facially unconstitutional since " 'citizens who desire to obey the statute will have no difficulty in understanding it . . . .' " *Colten* v. *Commonwealth*, 467 S.W.2d at 378." *Colten*, *supra* at 110.

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[8] Although we focus upon these three recent cases, others similarly corroborate our decision. In *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966) [cited with approval in *California* v. *LaRue*, 41 U.S.L.W. 4039 (U.S. Dec. 5, 1972), n. 5], involving a vagueness challenge to a state liquor law, the court was unconcerned with specific applications of the law to the parties and stated that "our concern . . . is only with the constitutionality of [the statute] on its face". *Id.* at 41. *See also United States* v. *Vuitch*, 402 U.S. 62 (1971); *Gesicki* v. *Oswald*, 336 F. Supp. 371 (S.D. N.Y. 1971), *aff'd*, 406 U.S. 913 (1972); *but cf. Palmer* v. *City of Euclid*, 402 U.S. 544 (1971).

In *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), the Court similarly reached the merits of a facial challenge to an anti-noise ordinance, finding it not to be vague. The attack was allowed even though the defendants admitted that the ordinance was not uncertain as applied to their conduct. It is apparent that the conduct punished in each of these three cases was precisely the type of activity which the statute sought to punish.[9] Assuming the statute was vague as applied in *Papachristou*, the Court must have recognized that it could not be interpreted so as to provide more certain notice to other potential offenders and hence there was no reason to abstain from a ruling on the claim of facial unconstitutionality. In *Colten* and *Grayned*, it was clear that failure to find vagueness as to the particular violators with which the Court was concerned would amount to a clean constitutional bill of health in all but perhaps a small number of peripheral cases, and hence it made no sense to perpetuate any doubts as to facial constitutionality in light of the void-for-vagueness challenge pressed in the case before the Court.[10]

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[9] The Court did not rest its decisions in these cases on the *Raines* exception allowing void-for-vagueness attacks on prohibitions affecting First Amendment rights, *supra* n. 7. In fact, it rejected allegations that the laws in *Colten* and *Grayned* infringed any right of assembly or speech.

[10] A somewhat anomalous case, *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963), seems to adopt an approach out of line with the cases we have analyzed. A federal act prohibiting sales at "unreasonably low prices" was attacked as void on its face. The Court's statements seem self contradictory, unless explained by the context of the case. "It is true that a statute attacked as vague must initially be examined 'on its face', but it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of 'valid' or 'invalid' solely on the basis of such an examination." *Id.* at 32. The Court then stated that it would "consider the vagueness attack solely in relation to whether the statute sufficiently warned [the offenders] . . . ." *Id.* at 33. After examining the past applications of the act and the violators' conduct, the Court noted the difference between an economic regulation case like the one before it and First Amendment cases.

Appellee's conduct in the case confronting us consisted of wearing an American flag on the seat of his pants. It is little different from other kinds of alleged contemptuous conduct sought to be covered by Mass. Gen. Laws ch. 264, § 5. It is located within an ill-defined middle ground between specifically mentioned activities like mutilation or defacing, and unmentioned behavior like exhibiting a clenched fist or making obscene gestures. We do not see how the statute could be so interpreted as to cover appellee and exclude others who place the flag in odd positions, or in conjunction with deprecatory symbols, gestures, or slogans, or who merely display it while acting out or speaking that which many Americans might consider obnoxious.[11] Additionally, the statute's words make it clear that the Massachusetts legislature did not intend to confine maltreaters of the flag to those who mutilate, trample

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It concluded that "[w]e are thus permitted to consider the warning provided by [the statute] not only in terms of the statute 'on its face' but also in the light of the conduct to which it is applied." *Id.* at 36. Three dissenters pointed out the inconsistency between *National Dairy* and *Cohen Grocery*. We cannot believe that a long line of cases was overruled *sub silentio* by *National Dairy*, especially since *Papachristou*, *Grayned*, and *Colten* and the cases cited in n. 8, *supra*, permitted facial attacks where there was no mention of First Amendment rights or where they were minuscule. Rather, we read *National Dairy* to say that a standard such as "unreasonableness" in the economic sphere of activity cannot be scrutinized in the abstract, but some reference to a factual setting must be made. Apparently the facts in *National Dairy* were like many others to which the Robinson-Patman Act applied and hence furnished some basis for an examination of the terms of that law. The case can therefore be taken as holding, in effect, that the Robinson-Patman Act is not void for vagueness as a constitutional flaw. *Cf.* 32 G.W. L. Rev. 126 (1963).

[11] *See State* v. *Bunch*, 26 Ohio Misc. 164, 54 Ohio Ops. 2d 354, 268 N.E.2d 831 (1970) (using flag as blanket on ground); *State* v. *Sinniger*, 486 P.2d 1303 (Ct. of App., Ore. 1971) (using flag as car seat cover); *Commonwealth* v. *Lorenc*, 220 Pa. Super. 64, 281 A.2d 743 (1971); (flying Communist flag above United States flag); *People* v. *Verch*, 63 Misc.2d 477, 311 N.Y.S.2d 637 (1970) (painting brownish-red a United States flag). Such cases illustrate the fact that arguably surprising applications of such a statute are not merely in the realm of imagination.

upon, or deface the flag but meant to cover separately other types of contemptuous treatment. We therefore conclude that resolution of appellee's challenge to the statute as applied to him necessarily adjudicates the statute's facial constitutionality, and we proceed to address appellee's vagueness argument.

There are well-established principles underlying the application of the vagueness doctrine. First, and perhaps the essence of the due process clause of the Fourteenth Amendment, is the rule that all persons "are entitled to be informed as to what the state commands or forbids." *Papachristou, supra* at 162. This fundamental requirement is such that a "conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process." *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963). We realize that words which may appear at first blush too vague, are, when examined at length and in their context, often found to comport with the requirement that they give adequate notice. *Jordan* v. *DeGeorge*, 341 U.S. 223, 231-32 (1951) n. 15. Many of these apparently vague statutes are made more definite for reasons classified in *Connally, supra* at 391-92,[12] and other cases.[13] While the examples stated

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[12] [T]hey employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, [cites omitted], or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, [cites omitted], or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery*, 255 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' ". *See also Cline*, *supra* at 459-60.

[13] Additionally, the statute may be part of a wider scheme which supplies certainty to its individual prohibitions, *United States* v. *Spector*, 343 U.S. 169 (1952); or in rare cases, judicial precedent and history may continue to provide line-drawing with regard to special types of state laws, *Roth* v. *United States*, 354 U.S. 476 (1957). Lastly, regulatory statutes governing business activities

in those cases are not exhaustive, they do provide a sharp contrast with the case before us in which none of these factors is present to give certainty of meaning to the statute. Instead, we have a law which forbids "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally, supra* at 391. This violates the underlying principle that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *Lanzetta, supra* at 453. The district court properly found, for example, that it is not clear "to what extent [the statute] prohibit[s] any public deviation from formal flag etiquette." *Goguen* v. *Smith, supra* at 167.

The possibilities of deviation which pose problems of legal forecasting are numerous: waving a flag during a speech critical of foreign or domestic policy; holding a flag while making a face or a contemptuous gesture; climaxing a speech by crumpling a flag; spitting in the direction of a flag—at a safe distance, and at an unsafe distance; wrapping a flag around oneself; displaying the flag against a background, surrounded with derogatory and condemnatory symbols and slogans; the sewing of a flag to a larger patriotic banner, to the jacket of a bemedalled veteran, to a sleeve of a Boy Scout leader, or even to the back of a motorcyclist's windbreaker. Yet any or none of these actions could be interpreted as "treats contemptuously". Since persons in Leominster's business district may have views of what constitutes contemptuous treatment of the flag differing from those of persons in Cambridge's Harvard Square, it is important that the statute give all persons definite notice of what acts are prohibited.

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provide greater leeway for legislative selection of words. *National Dairy, supra; Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952); *United States* v. *Petrillo*, 332 U.S. 1 (1947).

Secondly, it is also without contradiction that law enforcement authorities must be given sufficient guidelines as to prohibited offenses if they are to act properly, often in situations where emotions are high and a quick evaluation of the circumstances is necessary to effectuate constitutional arrests. "Lawmaking [must] not [be] entrusted to the moment-to-moment judgment of the policeman on his beat." *Gregory* v. *City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring). The statute before us fails to aid even a good faith attempt to enforce it, making us especially fearful of a "zealous effort by [officers] to discharge their duty [by] establish[ing] a standard of their own to be used as a basis to render the [statute] possible of execution". *Cohen Grocery, supra* at 91. Additionally, we must note that the generalized "crime" here lends itself to kinds of contemporary confrontations when "those convicted may be punished for no more than vindicating affronts to police authority." *Papachristou, supra* at 166-67. Moreover, the "unfettered discretion [which the statute] places in the hands of the [city] police", id. at 68, and prosecutors, and its failure to give adequate notice of the offense may never even be raised in possibly numerous unconstitutional applications because of the practice of dismissing cases by dropping charges before trial. In those situations, there will frequently be little opportunity to vindicate constitutional rights impaired by illegal arrests and detentions, records of which seem to follow even the most innocent throughout their lives.

Thirdly, we believe that any effort to enforce this law "would be the exact equivalent of an effort to cary out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of court and jury." *Cohen Grocery, supra* at 89. With the recent Supreme Court decisions that state juries in criminal trials may be formed

of less than twelve persons, *Williams* v. *Florida*, 399 U.S. 78 (1970), and that unanimity is not required for a conviction, *Johnson* v. *Louisiana*, 406 U.S. 356 (1972); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), the danger is greater that personal views of morality or politics or other whimsical notions may infect jury verdicts in the guise of providing certainty to an utterly vague phrase like "treats contemptuously". Thus a claim of facial unconstitutionality for vagueness arguably possesses a somewhat more compelling rationale for adjudication by courts than when there was the safeguard of the unanimity of a twelve-man jury.

We accept the Commonwealth's argument, for the sake of this discussion, that the definition of the terms 'treats contemptuously" includes "the feeling with which one regards that which is esteemed mean, vile or worthless". But we would feel most uneasy in compelling defendants to be subjected to what juries might deem "mean, vile, or worthless", words which seem too vague to apply to offenders of Mass. Gen. Laws ch. 264, § 5. The matter is not helped any by the supervisory power of a judge who is given no more certain a standard when called upon to decide if he should dismiss charges against the alleged offender.

The present case cannot be compared to the situation where a person who sees thousands of others illegally crossing a street seeks to escape punishment for commission of a similar wrong. In that situation there are well-defined crossing signals, cross-walks and signs which give all persons adequate notice that they are about to commit an offense. Instead we have the totally different situation where those charged with violation of the statute before us, after having seen unpunished hundreds, perhaps thousands, of citizens with American flags sewn to various parts of their clothes, or flying in frayed condition from radio antennas of automobiles, or used as advertising in store

windows, are expected to know that their similar actions —such as sewing a flag to the seat of one's pants—could constitute contemptuous treatment.

We conclude that, because "treats contemptuously" gives no sufficient warning to prospective offenders as to the reach of the law, affords law enforcers no clear guide for evaluation of actions, and offers neither judge nor jury any sufficient standards for inclusion and exclusion, the statute is impermissibly vague.

The First Amendment and Overbreadth

Thus far, we have approached this case with the assumption that the First Amendment is not involved. If it is, our analysis undergoes a considerable change from that which we employed in assessing the vagueness challenge. Our inquiry contains an added dimension—a judicial mandate to protect the favored status of rights to expression and association. *Kunz* v. *New York*, 340 U.S. 290 (1951). To phrase it differently, there is a greater solicitude that courts have, and ought to have, about the fear-inducing effect of any law which, by its very scope, constitutes a broad-gauged potential sanction against many who would seek to express themselves. So many cases have concerned themselves with this kind of anticipatory and open-ended threat of retaliation that a self-defeating jargon has crept into our jurisprudence—a terminology so brief, and easy, and common that it is all too quickly applied in complex factual setting by a casual reference to "chilling effect". The rubric is in danger of smothering analysis of the reality.

We have viewed the Massachusetts statute under which appellee was punished and have determined that it cuts a swath far beyond the individual defendant whose conduct is sought to be penalized. It is a double-edged sword of Damocles not only menacing the exercise of constitutional freedoms, but also serving to obstruct any future adjudi-

cations with regard to unknown, innumerable other individuals who may, because of the breadth of the statute, forego asserting their rights under fear of criminal prosecution and punishment.

Before discussing the analysis which led us to this conclusion we note that in light of the constitutional constellation in this area, *Thornhill*, *supra* at 96-98, *Coates* v. *City of Cincinnati*, 402 U.S. 611, 616 (1971), *Gooding* v. *Wilson*, 405 U.S. 518, 520-21 (1972), and *Grayned*, *supra* at 114, we are spared any extensive inquiry into the ability of the so-called "hard core" violator to mount an overbreadth challenge to a statute which involves itself with First Amendment rights. The issue is not one of standing,[14]

[14] Although in the past we ourselves have referred to the issue of permitting overbreadth attacks in non-First Amendment areas as involving "standing", *Reddy* v. *United States*, 403 F.2d 26 (1st Cir. 1968), *cert. denied*, 393 U.S. 1085 (1969), *reh'g denied*, 394 U.S. 967 (1969). We note that Supreme Court cases in the First Amendment area indicate that when a claim of overbreadth is made by a person convicted under the statute in question, the proper analysis consists of deciding whether the overbreadth technique yields a conclusion *on the merits* as to whether the statute is constitutional on its face. For a court to find lack of "standing" because it determines that the statute is not "susceptible of application to protected expression", *Gooding*, *supra* at 521, is to confuse the merits of the claim with the very different question of "standing". *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Younger* v. *Harris*, 401 U.S. 37, 42 (1971). It is significant that the word "standing" is not used by either the majorities or minorities in *Coates*, *Gooding* or *Colten*. Justice White's dissent in *Coates*, quoted in *Gooding*, and referring to *Raines* for the proposition that certain violators "will not be heard to attack the statute" or "permitted to raise its vagueness or unconstitutional overbreadth" as applied to others, may appropriately be thought of as reflecting upon the conclusions in which the policy-generated overbreadth analysis would have resulted as to the nature of the particular statutes involved and *not* upon any constitutional requirements for what is more properly called "standing". "In short, a party's standing to assert overbreadth should be dependent on the same factors which determine whether the statute should be invalidated on its face or not." Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 909 (1971). *But cf.* Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 100-101 (1960); R. Sedler, *supra*. Thus, though the Supreme Court chose to use the standing label in *Grayned*, *supra* at 114, the fact that it surmounted that conceptual barrier without difficulty reinforces our view.

for such violators have suffered sufficient injury to motivate a strong presentation against constitutionality in an adversary context. Whether appellee is "hard core" or not, therefore, we think his overbreadth challence must be addressed on the merits.

Since the overbreadth technique is a powerful weapon which, if improprely used, may contravene principles of federalism or separation of powers, it should be applied gingerly by federal courts. We think several self-limiting principles should be imposed by courts upon themselves. In the context of a federal habeas corpus proceeding a state criminal statute should not be ruled unconstitutional on its face as overbroad unless (1) the area affected by it includes a large proportion of First Amendment activities, (2) it possesses the potential for a substantial number of impermissible applications, and (3) immediate and effective excision of the statute's impermissible applications is not foreseeable without continued interruptions of First Amendment freedoms. Note, *The First Amendment Overbreadth Doctrine, supra* at 858, 863. We think that this tripartite test comports well with the proper resolution of frequently conflicting policies of federalism, the role of the courts and the protection of constitutional rights, and is supported by current Supreme Court rulings. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-33 (1963); *Coates; Gooding; Colten; Grayned.* Analysis of the Massachusetts statute before us under these standards requires a conclusion that it is unconstitutional as overbroad.

The first step in this analysis is to examine whether this flag desecration law affects an area of interests which includes a substantial proportion of First Amendment activities. The Commonwealth contends that its statute does not have a "clear nexus with [F]irst [A]mendment rights". It supports its argument in this regard by claiming ing that the phrase "treats contemptuously" is limited to

protecting the physical integrity of the flag, and that consequently the statute punishes only *acts* which constitute contemptuous treament and are unprotected by the First Amendment. Counsel, at oral argument, alleged that it was the *act* of sewing the flag onto the seat of appellee's trousers which was punished as contemptuous treatment.

There is no evidence to support the Commonwealth's assertions as to the interpretation of Mass. Gen. Laws ch. 264, § 5. We have been unable to find any authoritative Massachusetts state court ruling or Attorney General opinion bearing directly on the interpretation of the phrase here in question.[15] Since "we lack jurisdiction authoritatively to construe state legislation", *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369-70 (1971), *Gooding*, *supra* at 520, *Grayned*, *supra* at 110, we must do nothing more than give these words their ordinary dictionary meaning which the state itself quotes. If "treats contemptuously" is "circumscribed" by the state-supplied definition of "the act of contemning, or despising; the feeling with which one regards that which is esteemed mean, vile or worthless; disdain, scorn . . . derision, contumely", Webster's New International Dictionary (Unabridged, 2d ed., 1952), then so broad is this definition that the boundary provided encompasses the complete range of First Amendment freedoms. It subjects individuals to punishment for feelings and words—clearly protected First Amendment activities, *Street* v. *New York*, 394 U.S. 576 (1969)—as well as acts, which are not automatically without protection, *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969); *O'Brien*.

It is clear that the distinguishing feature of this statute

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[15] We note that the Massachusetts legislature is well aware of the presence and effect of this statute, having just recently amended it in 1971. Thus the Commonwealth's arguments on statutory reconstruction here are best addressed to its own courts or its legislature, and not to a federal court.

is that it makes criminal not just ill defined acts but rather acts *to the flag of the United States.* It is this distinction which clothes the majority of such acts with First Amendment interests. From time immemorial,

> "[T]he flag [has been] the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." *Halter* v. *Nebraska,* 205 U.S. 34, 43 (1907).

In *Joyce* v. *United States,* 454 F.2d 971, 975-76 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 969 (1972), Judge MacKinnon's exhaustive history of the flag led him to conclude that it symbolizes our nation's unity and independence, and that

> "[t]hroughout our history as a nation the flag has been our symbol in many wars, foreign and domestic . . . It has signified our national presence on battleships, airplanes, school houses and army forts . . . Wherever it flies it signifies the presence of the United States of America."

It is without doubt therefore that the flag has a meaning —a very special meaning—historically associated with support of our form of government and its majestic presence. If it did not speak by itself as a symbol of the United States of America, we doubt that any state would have sought to protect its message from verbal or physical abuse.

When more neutral, utilitarian objects such as draft cards are involved in conduct, courts have to decide when such conduct becomes symbolic speech. *O'Brien.* Symbol, semantically, stems from a Greek word meaning "token" or "sign", Webster's Third International Dictionary, Un-

abridged at 2316. (G. & C Merriam Co., Springfield, Mass., 1966.) More specifically, and important for the instant case, a symbol may constitute "an act, sound or material object having cultural significance and the capacity to excite or objectify a response." *Id.* Such a primary symbol, likely to be recognized by all who see it, speaks when it is placed in odd positions, conjoined with symbols or words, or made the butt of grimaces, speech, or gestures. We do not have to determine generally at what point that which is often called conduct becomes akin to pure speech.[16] But when the object is a pure symbol, such as the flag in *Halter,* the cross, the Star of David, the crescent, the swastika, the hammer and sickle, the red flag in *Stromberg* v. *California,* 283 U.S. 359 (1931), or black armband in *Tinker,* any individualized activity with regard to it outside of the purely logistical activity of maintaining or storing of it is bound to convey a message of fealty or revulsion and is "closely akin to pure speech". *Id.* at 505.

We have to agree with Judge Walsh that "[I]t is self-evident that most, if not all, conduct associated with the United States flag is symbolic speech. Such conduct is normally engaged in with the intent to express some idea. Further, such conduct is inavariably successful in communicating the idea." *Crosson* v. *Silver,* 319 F. Supp. 1084, 1086 (D. Ariz. 1970). *See also Long Island Vietnam Moratorium Committee* v. *Cahn,* 437 F.2d 344, 349 (2d Cir. 1970); *Hodson* v. *Buckson,* 310 F. Supp. 528, 533 (D. Del. 1970); *Thoms* v. *Smith,* 334 F. Supp. 1203, 1208 (D. Conn. 1971). We think that the statute reaches to a large degree conduct of which "the communicative content . . . was beyond dispute". *Cowgill* v. *California,* 396 U.S. 371, 372 (1970) (Harlan, J., concurring). Although the message may often

[16] *Cf.* L. Henckin, *Foreword: On Drawing Lines,* 82 Harv. L. Rev. 63, 80 (1968); Note, 68 Columbia L. Rev. 1091 (1968); Denno, *Mary Beth Tinker Takes the Constitution to School,* 38 Ford. L. Rev. 35 (1968).

seem somewhat "inarticulate", as it did to the Massachusetts Supreme Judicial Court and, we add, capable of various interpretations, ranging from misdirected humor, to political criticism, revulsion at society's values, and rejection of any national fealty, we think it clear that communication is the process being engaged in,[17] and that, whatever the reaction of observers might be to many kinds of conduct involving the flag, a substantial proportion of such conduct falls under the heading of First Amendment activities.

Having determined that the Massachusetts law presents an "actual and apparent danger" to symbolic speech which is more than "strained and remote", *Gooding, supra* at 533 (Burger, C.J., dissenting), we must utilize the *O'Brien* test, in order to decide whether it additionally possesses the potential for a substantial number of unconstitutional applications. More specifically, the statute may be constitutionally applied only if

> "[1] it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; [4] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien, supra* at 377.[18]

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[17] Indeed, this seems to be recognized in *Joyce, supra* at 976, where the court described such conduct as evidencing non-appreciation of the blessings which the flag represents, and intolerance of the finest representative government in the world, feelings which we note are not necessarily contemptuous. We find it difficult to reconcile this description with the court's conclusion that the statute which it was examining did not affect First Amendment rights more than marginally.

[18] We note that the parties in this case have treated the statute's constitutionality in terms of its compliance with the *O'Brien* standards and the district court based its decision on the application of those standards. However, *O'Brien* was concerned with a situation where

First, the state contends, and the district court found, that the state has an interest in the preservation of the flag as a symbol of unity on national ideas and purpose. Certainly this is the predominant view of the majority of lower federal courts which have been faced with this question, whether they found the particular flag desecration statutes before them to be constitutional,[19] or unconstitutional for other reasons.[20] State courts have taken a similar attitude.[21] In earlier times the Supreme Court itself stated that a state "may encourage patriotism and love of country among its people" by requiring respect for the flag, *Halter, supra* at 42, and more recently at least four Justices, separately dissenting in *Street* noted that there is a valid state interest in punishing acts of desecration and disgrace to the flag.

We have previously found that the phrase "treats contemptuously" is so vague so as to include words and

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"speech and non-speech elements are combined in the same course of conduct", *O'Brien, supra* at 376. What we have said thus far indicates that Mass. Gen. Laws ch. 264, § 5 affects not only conduct containing speech and non-speech elements, but also "silent, passive expression of opinion" with the flag which should not be viewed as "symbolic speech", but rather should be treated as "closely akin to 'pure speech'" because of the "political or controversial significance" of the symbols. *Tinker.* In that situation, the Court apparently does not apply the *O'Brien* test, but instead treats the statute as if only pure speech were involved. *Tinker; Cohen* v. *California*, 403 U.S. 15, 18 (1971). *See also Thornhill, Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). Nevertheless, we have applied the *O'Brien* test with the realization that if the statute cannot meet those standards for constitutionality, it is *a fortiori* unconstitutional if viewed as affecting pure speech.

[19] *Joyce; Hoffman* v. *United States*, 445 F.2d 226 (D.C. Cir. 1971); *United States* v. *Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969); *Sutherland* v. *DeWulf*, 323 F. Supp. 740 (S.D. Ill. 1971).

[20] *Hodson; Parker* v. *Morgan*, 332 F. Supp. 585 (W.D. N.C. 1971).

[21] *State* v. *Waterman*, 190 N.W.2d 809 (Iowa 1971); *People* v. *Radich*, 26 N.Y. 2d 114, 308 N.Y.S.2d 846, 257 N.E. 2d 30 (1970), *aff'd by equally divided Supreme Court*, 401 U.S. 531 (1971); *People* v. *Cowgill*, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853, *appeal dismissed*, 396 U.S. 371 (1970); *State* v. *Kasnett*, 30 Ohio App. 2d 77, 283 N.E.2d 636 (Ct. of App., Athens County 1972).

feelings, as well as acts, thus clearly transgressing the bounds of constitutionality in the former application as determined by *Street*. Yet when the application is also to an act constituting contemptuous treatment of the flag, there arises an issue explicitly left open by Mr. Justice Harlan's majority opinion in *Street* and his concurrence in *Cowgill*. We think that *West Virgina Board of Education* v. *Barnette*, 319 U.S. 624 (1943), provides a still solid rationale for the conclusion that it is not within the constitutional power to a state to prescribe criminal penalties for failure to show proper respect towards our flag by words or acts. Factually, of course, *Barnette* can be distinguished because it involved punishment for failure to act affirmatively in a gesture of support for the flag as a symbol of national unity. Here, we are concerned with the constitutional competence of a state to forbid by criminal penalties gestures of non-adherence, disapproval or contempt on the basis of promoting patriotism. Yet the applicability of the *Barnette* rationale in this situation is illustrated by its adoption in *Street* for the proposition that the constitutionally protected " 'freedom to be intellectually . . . diverse or even contrary', and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Street, supra* at 593. While it may be that disrespect for the flag can constitute grounds for non-criminal sanctions, we think that promotion of loyalty and patriotism may not constitutionally furnish a justification for imposition of criminal penalties. If verbal abuse of the flag cannot be proscribed in an effort to encourage respect for our national symbol, then we fail to understand how physical abuse which is visually communicative, the archetype situation which the Massachusetts statute reaches, can similarly be forbidden on these nationalistic grounds.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette, supra* at 642.[22]

We do not stand alone in this conclusion which may be politically unpopular, but is nevertheless required in our view by our Constitution. In finding the New York state flag desecration law unconstitutional as overbroad, Chief Judge Lumbard accepts Mr. Justice Harlan's analysis of the implications of *Barnette* in *Street* and his dismissal of "the state's interest in ensuring proper respect for the integrity of the flag." *Cahn, supra* at 349-50; *Crosson, supra* at 1087-88; *Thoms, supra* at 1210-11.[23] We therefore are satisfied that the activity sought to be punished by this statute falls within Mr. Justice Harlan's concern in *Street* that "*opinions* which are defiant or contemptuous" [emphasis added], be they expressed by words or communicative acts, cannot be punished in an attempt to engender respect for our flag.[24]

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[22] We do not find this analysis to be in conflict with the Court's decision in *Halter*. There, the challenge to the flag desecration statute was mounted by an advertiser who had utilized the flag symbol on beer bottles. It sought to bring the offensive conduct within the general protection afforded to our liberties, and thus did not expressly treat the problem within the framework of First Amendment rights or under overbreadth analysis. In any event, there is serious doubt in our judgment as to the continued vitality of *Halter* in view of *Barnette*. In adhering to the principles espoused in *Barnette* we are following what we believe to be the sounder, and certainly more recent, Supreme Court consideration of state schemes for promoting patriotism.

[23] The Supreme Court has also ruled that "a state has no legitimate interest in protecting any or all religions from views distasteful to them" sufficient to justify prior restraints. *Joseph Burstyn* v. *Wilson*, 343 U.S. 495, 505 (1952).

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[24] Even if we, the Second Circuit, and the other courts just cited are in error in drawing from *Barnette* and *Street* the teaching that there is no important state interest in protecting the physical integrity

Obviously, however, a state does have a valid interest in prohibiting conduct which will incite others to commit unlawful acts or provoke retaliatory actions amounting to a breach of the peace. It is quite possible that just as pure speech may cross a threshold beyond which it ceases to be safeguarded by the First Amendment, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), so may the symbolic speech with which we are concerned, though we reject any suggestion in *Joyce, supra* at 988-89 n. 42, that all acts of flag desecration are analogous to the use of "fighting words".[25]

Second, having determined that it is within the constitutional power of the state to punish flag desecration which presents some immediate threat of breach of the peace, there can be no doubt that the broad Massachusetts statute furthers that substantial or important government interest. Similarly, we must concede that if the Commonwealth were correct in its assertion that it could constitutionally promote nationalism through criminal penalties, then the statute's *in terrorem* effect strongly furthers that interest. However, the analysis under *O'Brien* does not end here.

Third, the governmental interest alleged by the Commonwealth must be unrelated to the suppression of free expression. Yet our analysis of the statute and colloquy with counsel at oral argument make it clear that if the Massachusetts flag desecration law is sought to be justified by promotion of patriotism, loyalty and nationalism, it can only do so by being, as it is, directed, point blank at the expression of and mere belief in particular ideas. Identical

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of the flag, our decision would be unaffected. As our subsequent discussion indicates, we would be compelled to hold either (1) that such an interest would fail under the third *O'Brien* standard in that the statute is related to the suppression of free expression, or (2) that it would fail under the fourth standard in that the incidental restriction imposed on First Amendment freedoms by this particular statute is greater than is essential to the furtherance of that interest.

[25] *Infra*, at 26.

acts committed to the flag—one sufficiently scornful to constitute contempt, and the other done in the absence of that requisite attitude—would be treated differently under the statute. Thus, as counsel admitted, a war protester who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion, who, caught in the same rainstorm while returning from an "America —Love It or Leave It" rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude, would *not* be prosecuted. When the statute is thus bared in skeletal form, its constitutional infirmity can be seen to adhere not to the attempt to punish an act, but rather to an effort to isolate and chastise an attitude said to be contemptuous. It is not an evil mind which is sought to be penalized, but rather what the state considers an impure mind, one which regards our flag with an attitude of disdain or scorn, *Hodson, supra* at 534, and cannot be "officially approved". *Tinker, supra* at 511.

Most importantly, the principles which we have attempted to state, however inadequately, are reflected in *Schacht* v. *United States*, 398 U.S. 58 (1970). There the Supreme Court was confronted with the conviction of a military man who had violated a federal statute allowing the wearing of an Army uniform off-duty only in theatrical productions which did not "tend to discredit" the Army. The proscription was justified by an attempt to classify it as reaching non-expressional conduct allegedly unprotected by the First Amendment. Yet, Mr. Justice Harlan responded to that argument by stating that the defendant's conviction

> "can be sustained only if he can be punished for speaking out against the role of the Army and our country in Vietnam. Clearly punishment for this reason would

> be an unconstitutional abridgement of freedom of speech. The final clause of [this statute] which leaves Americans free to praise the war in Vietnam but can send persons like [the defendant] to prison for opposing it, cannot survive in a country which has the First Amendment." *Schacht, supra* at 63.

Like the statute punishing the wearing of a military uniform if it tends to discredit the military, the Massachusetts flag desecration statute, to the extent that it evidenced a state interest in promoting nationalism, is directly related to the suppression of free expression. Like the school regulation in *Tinker*, it seeks to prohibit "expression of one particular opinion". *Id.* at 511. Since, however, the statute is alleged to be additionally concerned with breaches of the peace, we find that this second motive is sufficiently unrelated to the suppression of First Amendment rights so as to satisfy the third element of the *O'Brien* test.

We now address the fourth, and last, step in the *O'Brien* analysis. Since experience has demonstrated the propriety of imposing some restrictions on the exercise of First Amendment rights where substantial government interests are at stake, *Feiner* v. *New York*, 340 U.S. 315 (1951), it is of utmost importance that these incidental burdens be no greater than is essential to the furtherance of those interests. *O'Brien, supra* at 377. Yet our analysis of the Massachusetts statute has revealed that those burdens are heavy and direct, rather than incidental, and are consequently more extreme than necessary to prevent breaches of the peace. The statute focuses upon a particular attitude or belief, the content rather than the form of expression of which provides the foundation for the offense. In that respect, it suffers from a more serious constitutional flaw than the flat ban on certain words which was condemned in *Cohen* v. *California*.

Moreover, we believe that the statute is not so narrowly drawn "so as to include within its prohibition only those types of flag desecration which per se are likely to cause breaches of the peace." *Crosson, supra* at 1088. We think that the Massachusetts law is so broad in scope that "[a] most it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' *Tinker,* [*supra at*] 508;" *Cohen* v. *California, supra* at 23. As such, it punishes symbolic speech which may constitute no more than "peacefully expressing unpopular views". *Cox* v. *Louisiana,* 379 U.S. 536, 551 (1965). The Massachusetts courts apparently made no effort to delineate the bounds of this desecration law so as to more properly confine its application to situations where disorder is imminent. In fact, the Rescript Opinion of the Supreme Judicial Court, *Commonwealth* v. *Goguen,* 1972 Mass. Adv. Sh. 303, does no more than examine the words of the statute and concludes that it is not "on its face or as applied to him a restraint upon the right of freedom of speech...." As it now reads, that statute lacks sufficient "safeguards against impairment of that liberty [of expression] when the public order is not threatened." *Hodson, supra* at 535; *Thoms, supra* at 1210; *Crosson, supra* at 1088. Instead, the statute would eliminate a protected form of communication by improperly focusing upon its content, rather than on the locus of its occurrence which would more likely give concern for breaches of the peace. *Cohen* v. *California* teaches us that a "flat ban" on the content of a message is not within the constitutional power of a state to impose. We realize that fine distinctions may be drawn between what constitutes the content of, as opposed to the method used, in symbolic speech. Yet in the nebulous realm of symbolic speech there is truth in the statement that "the medium is the message" and to suppress the medium is to censor the message, *Crosson,*

supra at 1088; *Thoms, supra* at 1210; *Hodson, supra* at 533-34, especially where it is being conveyed through a passive form of expression. *Tinker, supra* at 514.

If some limiting construction of the flag desecration statute were foreseeable, we might decline to find it unconstitutional as overbroad if we felt that First Amendment rights would not suffer in the interim. However, we have no reason to believe that the Massachusetts courts would so limit that law. Constitutional claims were presented by appellee and rejected at every level of the state court proceedings. Since "our federalism" must take account of individual rights and liberties in its balancing of state and federal interests, it clearly requires that we act now without waiting, perhaps a long time, for another state court ruling on the statute's constitutionality. The advance illimitable threat of criminal sanction which the flag desecration law poses to constitutionally-protected rights of others who may forego those rights can similarly be eliminated only by our timely decision.

We have previously mentioned that the state would have us interpret its statute such that the phrase "treats contemptuously" be thought to refer only to acts which affect the physical integrity of the flag. In part, we have accepted the state's contention for purposes of this case. Yet we are bound by *Thirty-Seven Photographs, supra* at 369-70, *Gooding, supra* at 520, and *Grayned, supra* at 110, that we cannot authoritatively construe state legislation, nor should we do so here where the state courts have adopted an "all or nothing" attitude, *Cahn, supra* at 348. This is not a case like *Street* where a federal court could, by excising but a few words, draw precise lines with constitutional certainty so as to eliminate the interpretation or provision of the statute under which the defendant was convicted. Such per se rules of First Amendment privilege, Note, *The First Amendment Overbreadth Doctrine, supra* at 882-

910, were appropriate there because the Court felt that the defendant in *Street* might have been convicted of casting contempt, "by words", and it could easily excise those words from the statute, thereby reversing that defendant's conviction. The case before us is quite different in that by deleting the phrase "treats contemptuously" from Mass. Gen. Laws ch. 264, § 5, we would completely frustrate and subvert the Commonwealth's intention as evidenced by those terms. Clearly, as the Commonwealth stated at argument, it does not wish to punish all acts of the flag, but only contemptuous ones. Yet to alter the face of this statute, leaving it to read "Whoever publicly mutilates, tramples upon, [or] defaces ... the flag" would be legislating for the state, because the element of contempt common to every offense under this statute would be removed. Additionally, this is not a case like *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), or *Roth* v. *United States*, 354 U.S. 476 (1957), where a statute dealt with a specific subject matter such that the Court could immediately seize upon a few constitutional factors which could be built in to the statute. While judicial activity in the areas of libel, slander and obscenity is now considered traditional in terms of drawing lines to rescue statutes in those areas, such action here would be more difficult and less desirable for a federal court. Note, *The First Amendment Overbreadth Doctrine*, *supra* at 897-910.

Therefore, having found that Mass. Gen. Laws ch. 264, § 5 affects an area which includes a large proportion of First Amendment activities; that it possesses the potential for a substantial number of impermissible applications; and that it is not foreseeable that the statute's unconstitutional applications could be immediately and effectively excised without continued interruptions of First Amendment freedoms, we conclude that the statute must fall as overbroad.

Lastly, it remains to be said that if our analysis is valid that the statute unconstitutionally impairs First Amendment rights, its vice of vagueness is all the more serious. A long line of Supreme Court cases in the First Amendment area stand for the proposition that "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961). We therefore note that the Massachusetts statute, having been determined vague, and First Amendment rights being substantially affected by it, falls within this line of cases. *Gooding; Coates; Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Cox, supra* at 551-52.

Affirmed.

HAMLEY, *Circuit Judge* (Concurring): I concur in the majority opinion to the extent that it determines that the court should consider the question of vagueness in a non-First-Amendment context and that, in this context, the portion of the Massachusetts statute applied here is impermissibly vague. These determinations are dispositive of this appeal since they require that the district court order granting the writ be affirmed.

This being so, I express no view concerning the alternative and far broader constitutional ground for affirmance stated in the majority opinion, namely that, in view of First Amendment considerations, the Massachusetts statute is void for overbreadth. There is a settled principle of appellate adjudication that constitutional questions are not to be dealt with unless this is necessary to dispose of

the appeal. Moreover, as the majority points out, since the overbreadth technique is a powerful weapon which, if improperly used, may contravene principles of federalism or separation of powers, "it should be applied gingerly by federal courts." I prefer to reserve my own determinations in this delicate constitutional area for a case in which such determinations must be made.

APPENDIX B

COMMONWEALTH *vs.* VALARIE GOGUEN.

(Rescript Opinion)

The defendant was convicted of publicly treating contemptuously the flag of the United States in violation of G.L. c. 264, § 5. The case is before us on the defendant's amended bill of exceptions. There was evidence that on Main Street in Leominster he was wearing a cloth American flag sewn to the seat of his blue jeans, and that certain bystanders were amused. We reject his claim that the statute is on its face or as applied to him a restraint upon the right of freedom of speech guaranteed by the First Amendment to the Constitution of the United States. *Halter* v. *Nebraska*, 205 U.S. 34, 41. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 574. *United States* v. *O'Brien*, 391 U.S. 367, 376. *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 743-746 (S.D. Ill.). *Oldroyd* v. *Kugler*, 327 F. Supp. 176, 178 (D. N.J.). Compare *Cowgill* v. *California*, 396 U.S. 371, 372 (concurring opinion of Harlan, J); *Hiett* v. *United States*, 415 F. 2d 664, 672 (5th Cir.), *cert. den. sub nom. United States* v. *Hiett*, 397 U.S. 936. *Long Island Vietnam Moratorium Comm.* v. *Cahn*, 437 F. 2d 344, 348-350 (2d Cir.), *cert. den.* 400 U.S. 956. His communication, if any, was so thoroughly inarticulate as to lack the slightest redeeming social importance. See *Roth* v. *United States*, 354 U.S. 476, 484. He was not prosecuted for being "intellectually . . . diverse" or for "speech," as in *Street* v. *New York*, 394 U.S. 576, 593-594, or for a "vulgar allusion," as in *Cohen* v. *California*, 403 U.S. 15, 20. Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here. *Sutherland* v. *DeWulf*, *supra*, at 746-749. *Oldroyd* v. *Kugler*, *supra*, at 178-179. See *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340. Compare Rep. A. G., Pub. Doc. No. 12 (1968)

192-193. Compare *Hoffman* v. *United States*, 445 F. 2d 226, 228-229 (D.C. Cir.), with *Hodsdon* v. *Buckson*, 310 F. Supp. 528, 536 (D. Del.), *Crosson* v. *Silver*, 319 F. Supp. 1084, 1089-1090 (D. Ariz.), and *Parker* v. *Morgan*, 322 F. Supp. 585, 588-593 (W. D. N. C.). The jury could infer that the violation was intentional without reviewing any words of the defendant. *Commonwealth* v. *Williams*, 312 Mass. 553, 557. *State* v. *Turner*, 78 Wash. 2d 276, 283-284. See *People* v. *Radich*, 26 N.Y. 2d 114, 125, *aff'd.* by an equally divided court, *sub. nom. Radich* v. *New York*, 401 U.S. 531. Compare *Smith* v. *California*, 361 U.S. 147, 152. The statute does not require that the flag be "official." There was no abuse of discretion in excluding evidence offered through a "vexillologist" as to the conntemporary use and treatment of the flag. *Johnson* v. *Orange*, 320 Mass. 336, 338. *Scully* v. *Joseph Connolly Ice Cream Sales Corp.*, 336 Mass. 392, 394. There was no error.

Exceptions overruled.

APPENDIX C

OPINION OF THE ATTORNEY GENERAL

Rep. A-G., Pub. Doc. No. 12 (1968) 192-193.

MR. JOSEPH LEO DRISCOLL, *President, Southeastern Massachusetts Technological Institute.*

DEAR PRESIDENT DRISCOLL: — In your letter of May 8, 1968, you have asked whether a certain publicly displayed painting by a freshman art student on a wooden door constitutes a violation of G.L. c. 264, §5, a criminal statute.

The facts as stated in your letter may be summarized as follows: The door was painted in response to an art class assignment to design a flag or banner for any country, group, organization or family *as it might appear in the year 2000.* The painting contained, on one side, 13 alternating red and white horizontal stripes and, in the upper left-hand corner, a rectangular field of blue. Superimposed on the blue field was a white swastika. There were no stars. On the reverse side of the door the number "101" was painted. The freshman who produced this work has asserted that it "is his personal expression as to the possible appearance of a flag of the United States in the year 2000." He also said that the number "101" is symbolic of the torture chamber described in the novel "1984" by George Orwell. The door was hung by students against a second floor balcony wall in the lobby of the Institution so that only the side with the stripes, blue field, and swastika was visible. Subsequently it was removed by school authorities.

General Laws c. 264, §5 is a penal statute. Its violation may be punished by a fine of up to $100 or imprisonment for not more than one year, or both. Its provisions are directed against whoever "publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . ., or whoever *displays* such flag or *any*

representation thereof upon which are words, figures, advertisements or designs . . . . Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purpose of this section be deemed to be upon such flag . . . ." (Emphasis supplied.)

I am of the opinion, after a careful reading of the above statute, that the conduct you have described does not constitute a violation.

It is well established in our law that a statute which is "penal in nature . . . is not to be enlarged beyond its plain import, and as a general rule is strictly construed." *Commonwealth* v. *Hayden,* 211 Mass. 296, 297. In other words, no matter how ill-advised and tasteless the conduct in question, it does not violate G.L. c. 264, §5, unless it is plainly prohibited by the language of the statute.

The facts, which are apparently undisputed, are that the painting is an imagined representation of this nation's flag as *it might be* at the end of this century. The painting clearly does not represent our flag as it now exists, since the stars are omitted. Thus we do not have, as required by the words of the statute, *a flag of the United States* upon which are words, figures, advertisements or designs. Rather we have a painting of an imaginary flag that somewhat resembles, but in at least one material respect differs from our own.

A contrary interpretation of G.L. c. 264, §5, as it applies to this situation, would raise serious questions under the First and Fourteenth Amendments to the Constitution of the United States and Article XVI of the Declaration of Rights in the Massachusetts Constitution.

In rendering this opinion I certainly do not suggest you

and the other officials at the Institute have exceeded your authority in refusing to permit students to hang this painted door in the lobby of the Institute, nor do I in any way indicate approval of this object. You have broad discretion to control the display of paintings and other objects on Institute property. I rule only, on the facts presented in your letter, that there is no basis for criminal prosecution under G.L. c. 264, §5.

Very truly yours,

ELLIOT L. RICHARDSON, *Attorney General*

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1254.

JOSEPH SMITH, SHERIFF OF WORCESTER COUNTY,
Appellant,
v.
VALERIE GOGUEN,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO AFFIRM.

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Supreme Court of the United States.

October Term, 1972.

No. 72-1254.

JOSEPH SMITH, Sheriff of Worcester County,
Appellant,
v.
VALERIE GOGUEN,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO AFFIRM.

The appellee moves, pursuant to Rule 16, that the Court affirm the judgment of the United States Court of Appeals for the First Circuit on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

Question Presented.

Whether the questions presented by this appeal are so unsubstantial as not to need further argument.

Statement.

This is an appeal by Joseph Smith as he is the Sheriff of Worcester County from a judgment of the United States Court of Appeals for the First Circuit affirming an order and judgment of the District of Massachusetts discharging Valerie Goguen from a sentence imposed by the Superior Court of the Commonwealth of Massachusetts for Worcester County. Goguen was found guilty after a jury trial in the Worcester County Superior Court of violation of Massachusetts General Laws, c. 264, § 5,[1] and sentenced to a term of six months in the Worcester County House of Correction.

The material evidence presented at the jury trial was that Goguen was twice observed by police officers of the town of Leominster, Massachusetts, to be in public view with a small cloth American flag sewn to the seat of his pants. When one police officer questioned Goguen about the flag, the other persons present were laughing.

On appeal, the Supreme Judicial Court of Massachusetts affirmed the conviction. *Commonwealth* v. *Goguen*, Mass. Adv. Sh. (1972) 303, 279 N.E. 2d 666. Thereafter Goguen filed a petition for a writ of habeas corpus in the District Court (Jurisdictional Statement, 4, 5).

The Questions Presented are Unsubstantial.

A. The Court Below Properly Considered Goguen's Claim that Massachusetts General Laws, C. 264, § 5, is Unconstitutionally Vague on its Face.

The appellant asserts in his jurisdictional statement that the United States Court of Appeals for the First Circuit improperly considered Goguen's claim that G.L. c. 264, § 5,

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[1] The statute is set out in full at Jurisdictional Statement, 3, 4.

is unconstitutionally vague on its face on the ground that this issue was not fully presented to or considered by the Massachusetts Supreme Judicial Court (Jurisdictional Statement, 5, 6). Whatever criticisms the appellant levels at Goguen's brief in the Supreme Judicial Court, it is clear that that Court did consider and reject a claim of facial unconstitutionality.[2]

> "We reject his claim that the statute is on its face or as applied to him a restraint upon the right of freedom of speech guaranteed by the First Amendment to the Constitution of the United States." *Commonwealth* v. *Goguen*, Mass. Adv. Sh. (1972) 303, 279 N.E. 2d 666, 667 (1972).

Indeed, it is ironic that the appellant now seeks to make this argument, which was not presented to either the Court of Appeals or the United States District Court. Apparently the appellant has confused the Court of Appeals' exhaustive discussion of Goguen's standing to raise the question of facial unconstitutionality with the totally separate issue of whether such a claim was presented to the State Court (see Jurisdictional Statement, Appendix A, 24-33).

Further discussion of this point is obviated by the opinion of the United States District Court in this case. That Court reviewed Goguen's claims including one as to facial unconstitutionality and found as follows.

> "No contention is now made that the petitioner has not exhausted state remedies, not that the constitutional issues presented here were not raised appropriately in state proceedings." *Goguen* v. *Smith*, 343 F. Supp. 161, 164 (D. Mass. 1972).

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[2] We do not concede that the issue of facial unconstitutionality was not adequately argued before the Massachusetts Supreme Judicial Court.

The appellant also seems to misapprehend the decision of the Court of Appeals. It is submitted that that Court found, as did the District Court before it, that G.L. c. 264, § 5, is unconstitutionally vague both on its face and as applied to Goguen since the two considerations are merged within the factual content of this case, without regard to the First Amendment.

> "We do not see how the statute could be so interpreted as to cover appellee and exclude others who place the flag in odd positions, or in conjunction with depreciatory symbols, gestures or slogans, or who merely display it while acting out or speaking that which many Americans might consider obnoxious. Additionally, the statute's words make it clear that the Massachusetts legislature did not intend to confine maltreaters of the flag to those who mutilate, trample upon, or deface the flag, but meant to cover separately other types of contemptuous treatment. We therefore conclude that resolution of appellee's challenge to the statute as applied to him necessarily adjudicates the statute's facial constitutionality and we proceed to address appellee's vagueness argument." (Jurisdictional Statement, Appendix A, 28, 29.)

The Court of Appeals also found that the statute was overbroad and unreasonably impinged upon the freedom of speech guaranteed by the First Amendment.

> "Therefore, having found that Mass. Gen. Laws ch. 264 § 5 affects an area which includes a large proportion of First Amendment activities; that it possesses the potential for a substantial number of impermissible applications; and that it is not foreseeable that the statute's unconstitutional applications could be immediately and effectively exercised without continued

interruptions of First Amendment freedoms, we conclude that the statute must fall as overbroad." (Jurisdictional Statement, Appendix A, 48.)

Thus, the opinion of the Court of Appeals as to the overbreadth of the statute is at most a form of "harmless error" in view of its affirmance of the District Court decision.

B. It is Manifest that the Questions on which the Decision of this Cause Depends are so Unsubstantial as Not to Need Further Argument.

The appellant argues that the State has an important interest in imprisoning Goguen for six months because he was seen to have an American flag sewn to the seat of his pants. It is asserted that this interest is to preserve the public peace and to preserve the flag as a symbol of unity on national ideals and purpose. (Jurisdictional Statement, 19).

With respect to the first "interest," it is clear that Massachusetts has gone beyond what is reasonable and necessary to preserve it. All the Circuit Courts and most of the District Courts which have considered the question agree that such a statute is unconstitutionally vague and overbroad, both in apposite factual context. *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Md. 1970) (flying United States flag in positions inferior to that of United Nations flag); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F. 2d 344 (2d Cir. 1970) (superimposing "peace symbol" on United States flag); *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970) (burning United States flag); and generally, *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D. N.C. 1971), and *Thoms* v. *Smith* 334 F. Supp. 1203 (D. Conn. 1971). See *Hoffman* v. *United States*, 445 F. 2d 226 (D.C. Cir. 1971).

It is, however, in the second asserted "interest" that the real nature of this statute and this prosecution may be found. It is appalling that the appellant would assert that there is a legitimate state interest in preserving political "unity." By its assertion, the State says that it wishes to punish communication of a political nature *for its content.* The State asserts that it is permissible to use the flag as a symbol of national unity, but to use it to suggest national disunity or dissent will result in imprisonment. This is the very antithesis of the First Amendment. Certainly to claim that a State may compel a show of respect for political orthodoxy is a manifestly unsubstantial claim in view of the long string of decisions of this Court to the contrary.

Those decisions arise in the symbolic speech case of *Stomberg* v. *California,* 283 U.S. 359 (1931), go through the flag salute case, *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), and culminate in the "contemptuous treatment" case of *Street* v. *New York,* 394 U.S. 576 (1969). As this Court said in *Street*:

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, *including those opinions which are defiant or contemptuous.*" 394 U.S. 576, at 593. (Emphasis added.)

It is indeed unsubstantial, in view of the foregoing, for the appellant to assert now that there is a legitimate state interest in preserving national unity through criminal sanctions against those who peacefully disagree.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the appellee's motion to affirm should be granted.

By his attorneys,

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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1254

JOSEPH SMITH, SHERIFF OF
WORCESTER COUNTY,
APPELLANT,

v.

VALARIE GOGUEN,
APPELLEE.

BRIEF FOR APPELLANT

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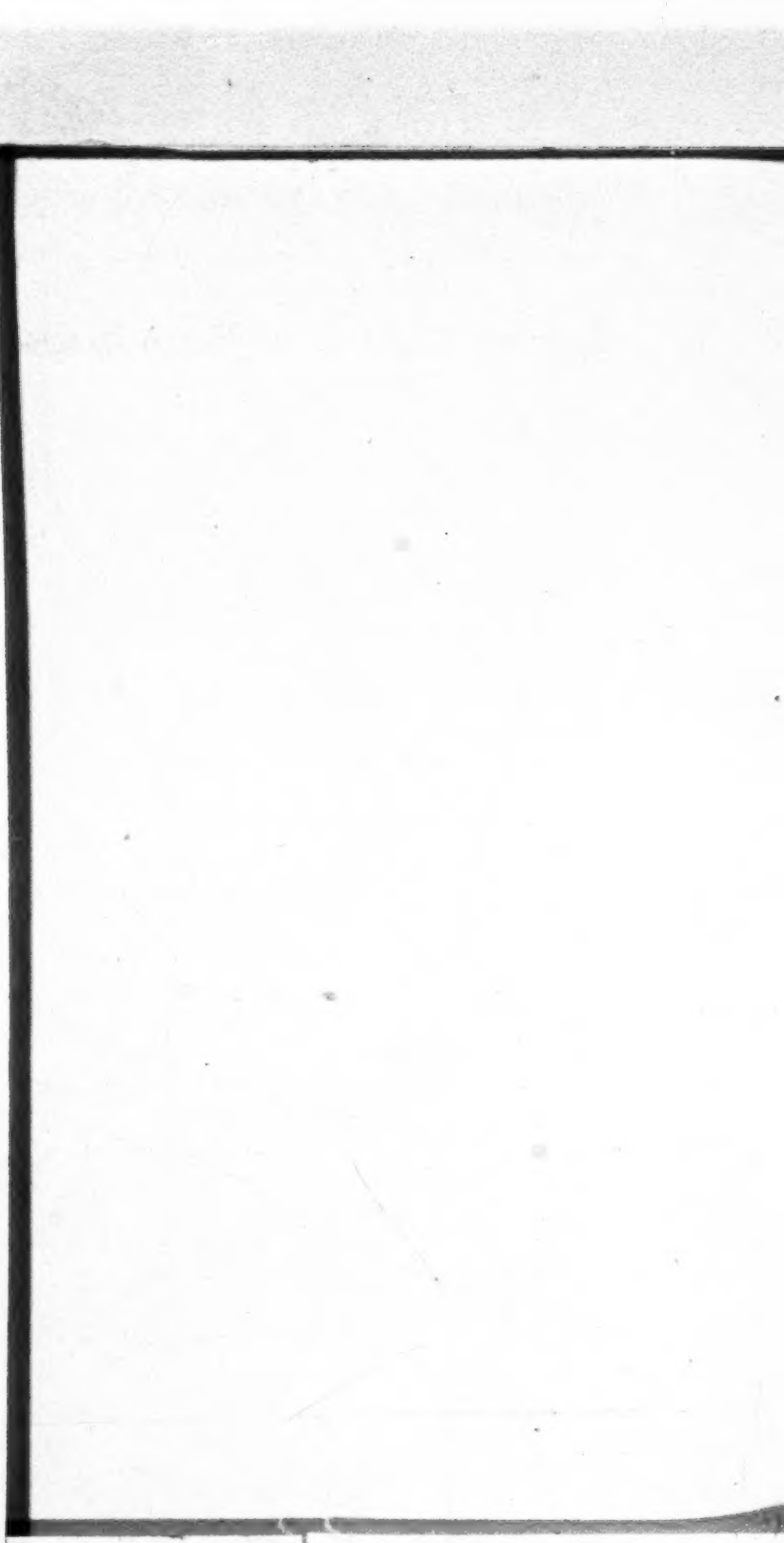


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APPELLEE.

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Appeals is reported at 471 F.2d 88 and is reproduced in the Jurisdictional Statement commencing at page 21. The opinion of the United States District Court is reported at 343 F. Supp. 161 and can be found in the Appendix commencing at page 47. The opinion of the Supreme Judicial Court of Massachusetts is reported at 1972 Mass. Adv. Sh. 303, 279 N.E.2d 666 and can be found commencing at page 37 of the Appendix.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(2). The judgment of the Court of Appeals was entered on December 14, 1972. A timely notice of appeal was filed on January 29, 1973, and the appeal was docketed in this Court on March 14, 1973. On May 21, 1973, probable jurisdiction was noted.

Question Presented

Whether the Court of Appeals erred in finding Mass. Gen. Laws, ch. 264 §5, on its face, to be impermissibly vague in violation of the Fourteenth Amendment and overbroad in violation of the First Amendment?

Constitutional Provisions

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

At the time of the offense charged in this case, Massachusetts General Laws, Chapter 265 Section 5, read:

§5. Flag; penalty for misuse.

"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a respresentation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag. Notwithstanding the foregoing, there may be attached to the staff bearing a flag of the United States or of Mas-

sachusetts belonging to an organization of veterans of the Civil War, to a camp of the United Spanish War Veterans, to a post or department of The American Legion, or to a post or department of the Veterans of Foreign Wars of the United States, or to a post or department of the Jewish War Veterans of the United States, or to a camp or department of the Sons of Union Veterans of the Civil War, or to a barracks or department of the Veterans of World War I of the U. S. A., or belonging to or used in the service of the United States or the commonwealth, a streamer having inscribed thereon the names of battle and the name and number of the organization to which such flag belongs. For the purposes of this section, a flag shall be deemed to continue to belong to any organization of veterans hereinbefore specified, although such organization has ceased to exist, during such time as it remains in the lawful ownership or custody of any other of the aforesaid organizations or of the commonwealth or of any political subdivision thereof, or of any patriotic or historical society incorporated under the laws of the commonwealth or determined by the adjutant general to be a proper custodian thereof."

Title 28, United States Code, Section 2254(b), which provides:

"An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Statement

A criminal complaint was brought against the appellee, Valarie Goguen, in the District Court of Leominster, Massachusetts, on January 31, 1970, which charged that he did publicly treat contemptuously the flag of the United States in violation of Mass. Gen. Laws, ch. 264 §5 (App. 4-5). After trial and conviction in the District Court, appellee made a timely appeal for a trial *de novo* in the Worcester County Superior Court (App. 1).

The relevant evidence presented during the Superior Court jury trial was as follows: On January 30, 1970, a Leominster police officer observed the appellee standing with a group of persons on Main Street in Leominster. Appellee was seen to have a cloth American flag, approximately 3 x 5 or 4 x 6 inches sewn to his pants in the vicinity of the left portion of his buttocks. The police officer questioned the appellee about the flag and during this questioning he observed that the other people present were laughing (App. 2-3).

On the same day, another Leominster police officer observed the appellee walking in the downtown business district of Leominster with an American flag sewn onto his pants in the area of his buttocks (App. 3).

The jury returned a verdict of guilty and the appellee received a sentence of six months in the House of Correction (App. 2). On appeal, the Supreme Judicial Court of Massachusetts affirmed the conviction in a rescript opinion. *Commonwealth* v. *Goguen*, 1972 Mass. Adv. Sh. 303, 279 N.E.2d 666 (1972), (App. 37).

On February 23, 1972, appellee filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. By agreement, the parties presented to the District Court the record and briefs that were before the Supreme Judicial Court; no other evidence was offered (App. 39-40, 45-46). Judgment grant-

ing the writ of habeas corpus was entered on June 13, 1972. The Commonwealth appealed (App. 58-59).

On December 14, 1972, the Court of Appeals for the First Circuit, having found the Massachusetts flag statute to be both facially vague and overbroad, affirmed the judgment of the District Court (App. 61, Jur. St. 49). A timely notice of appeal was filed on January 29, 1973 (App. 60, 62).

The appeal was docketed in this Court on March 14, 1973; probable jurisdiction was noted on May 21, 1973.

Summary of Argument

I.

A. In presenting his case to the Supreme Judicial Court of Massachusetts, appellee made only an allegation that ch. 264 §5 was impermissibly vague on its face. This bare allegation was never developed in terms of whether the statute gives adequate notice, on its face, of what conduct it proscribes. Since a facial vagueness argument was not made, the state court opinion did not address itself to that issue. The opinion of the state court is in obvious harmony with its rule that issues not *argued* in briefs need not be considered.

B. The First Circuit Court of Appeals erred in analyzing this case in terms of a facial vagueness claim. An examination of the state court record and opinion clearly shows that appellee failed to argue such a claim in the state court. The doctrine of exhaustion of state remedies has been violated in this case. 28 U.S.C. §2254(b); *Picard* v. *Connor*, 404 U.S. 270 (1971).

II.

Assuming, *arguendo*, that the First Circuit could properly consider a facial vagueness claim, that Court wrongly decided the issue. The subject matter of the statute is uniquely narrow, namely, actual flags of the United States.

Additionally, culpable intent has to be proven to establish a violation of the statute. These factors, taken together with accepted rules of statutory construction and analagous Massachusetts cases, give adequate notice of what the statute proscribes.

III.

A. Massachusetts' interest in flag legislation is real, multi-faceted and difficult to capture in a short formula. The First Circuit erred in constricting and equating that interest to a promotion of loyalty and patriotism.

Because Massachusetts has a valid interest in comprehensive flag legislation, ch. 264 §5 does not abridge free speech on its face. Depending upon the coalescence of a number of variable facts, conduct impinging upon the physical integrity of the flag can bring the First Amendment into play. Since the statute reaches only intentional acts that affect the physical integrity of United States flags it is not overbroad on its face.

B. There is no recognizable communicative element in appellee's conduct that would bring the First Amendment into play. Assuming that the appellee was attempting to convey an idea, the statute is constitutional since it meets the four criteria set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Appellee's wearing of the flag on his buttocks is conduct within the statutory proscription.

Argument

I. In the Circumstances of this Case the First Circuit Court Erred in Finding Mass. Gen. Laws, Ch. 264 §5 Unconstitutionally Vague on its Face.

A. *The Case in the Supreme Judicial Court of Massachusetts.*

The appeal to the Supreme Judicial Court in this case was made by way of a bill of exceptions, a process gov-

erned by Mass. Gen. Laws, ch. 278 §31.[1] Pages one through seven of the Appendix reproduce the amended bill of exceptions that was entered in the Supreme Judicial Court. This was the entire appellate record before the Court.

The term "vague" appears but *once* in the *record* on appeal to the Supreme Judicial Court, to wit:

> "The [appellee] filed a Motion to Dismiss the Complaint on the ground that G.L. c. 264 §5 is unconstitutional on its face and as applied to him in that it violates the right to freedom of speech guaranteed by the First Amendment to the United States Constitution, and it violates the right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Part I Article 12 of the Declaration of Rights in that it is overly broad, impermissibly vague and incapable of fair and reasonable interpretation by public officials." (App. 1).

At first glance, it might appear that appellee intended to include in his argument to the Supreme Judicial Court that the statute was vague on its face. But a review of appellee's brief, filed in support of his amended bill of exceptions, reveals no such argument.

In his "statement of the case" appellee set forth the language quoted immediately above (App. 8). Thereafter, in his "summary of argument", he stated:

> "General Laws ch. 264 §5 violates on its face the due process clause of the Fourteenth Amendment in that

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[1] Mass. Gen. Laws, ch. 278 §31 provides in relevant part: "Exceptions may be alleged by a defendant in a criminal case who is aggrieved by an opinion, ruling, direction or judgment of the superior court rendered upon any question of law arising at the trial of such case. . . . The exceptions shall be reduced to writing and filed with the clerk. . . . The clerk . . . shall present them to the court, and if, upon examination thereof by the presiding justice, they are found conformable to the truth, they shall be allowed by him."

it is overly broad and brings within its ambit constitutionally protected activity." (App. 11).

When he arrived at this issue in the body of his argument, he framed it in these terms:

> "B. General Laws Ch. 264 §5 On Its Face Violates The Due Process Clause Of The Fourteenth Amendment Of The United States Constitution In That It Is Overly Broad." (App. 19).

The six pages of argument that follow the "Fourteenth Amendment issue" do not address themselves to aspects of vagueness, but rather discuss speech, both pure and symbolic, and its relationship to the First Amendment (App. 19-26 and cases cited therein). The section contains neither a discussion of adequate notice to prospective offenders, nor a discussion of the statute's alleged lack of sufficient guidelines for law enforcement authorities, fact-finders and reviewing courts. Although the appellee introduced this section of his brief with a reference to the Fourteenth Amendment, the argument and cases cited in support of the argument are clearly directed to the First Amendment and overbreadth.

The opinion of the Supreme Judicial Court evidences that it did not analyze the statute in light of a facial vagueness challenge:

> "Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here." (App. 37).

This holding is in obvious harmony with Supreme Judicial Court Rule 1:13 which reads:

> "No oral argument shall be heard, except by special permission of the court, in behalf of a party for whom no brief has been filed as provided in these rules. *The court need not pass upon questions or issues not argued in briefs.* Nothing argued in a brief shall be deemed to be waived by a failure to argue orally." (Emphasis supplied).

The Court frequently resorts to this rule when an issue is not fully argued in a protagonist's brief. *Commonwealth* v. *Roberts,* 1972 Mass. Adv. Sh. 1477, 1487-88, 285 N.E.2d 919, 926 (1972); *Lindahl* v. *Sullivan,* 1972 Mass. Adv. Sh. 645, 281 N.E.2d 231, 232 (1972); *Blais* v. *Quincy Mutual Fire Ins. Co.,* 1972 Mass. Adv. Sh. 195, 196, 278 N.E.2d 746, 747 (1972); *Commonwealth* v. *White,* 358 Mass. 488, 492, 265 N.E.2d 473, 475 (1970); *Commonwealth* v. *Wilson,* 355 Mass. 441, 443, 245 N.E.2d 439, 440 (1969). An advocate has to do more than just state the issue in his brief; he must argue it. *Blais* v. *Quincy Mutual Fire Ins. Co., supra* at 645, 278 N.E.2d at 747. Moreover, when an issue is not fully briefed, the Court will treat the issue as *waived* even though the issue may be based upon "constitutional considerations." *Commonwealth* v. *Roberts, supra* at 1487-88, 285 N.E.2d at 926 (alleged denial of equal protection of the laws); *Commonwealth* v. *White, supra* at 492, 265 N.E.2d at 475 (allegation of double jeopardy). Thus, the First Circuit's conclusion (Jur. St. 24) that the Supreme Judicial Court "assume[d that] there was no vagueness [in the statute] as applied to appellee is inaccurate. The Supreme Judicial Court decided the case at it was pressed by the appellee. Appellee argued that the statute proscribed conduct protected by the First Amendment. Most of the rescript opinion is directed to First Amendment considerations (App. 37). Whatever the appellee had in mind as to Fourteenth Amendment vagueness totally blurred into First Amendment overbreadth in his brief.

The Supreme Judicial Court did apply the terms of the statute to appellee's conduct and found no vagueness. Since the appellee did not articulate or develop an argument regarding facial vagueness the Court did not reach that issue.

B. *The Case in the United States District Court and the First Circuit Court of Appeals.*

The amended bill of exceptions and the briefs of the parties to the Supreme Judicial Court were submitted to the United States District Court pursuant to its order that the parties designate "all papers and proceedings in the state court" that the parties deemed relevant (App. 45-46). The state court briefs were submitted in addition to the state court record to enable the federal courts not only to have the undisputed facts but also to see what questions of law appellee had argued from those facts. *Cf. Picard* v. *Connor,* 404 U.S. 270 (1971).

An examination of the state court record and briefs reveals that the appellee never developed an argument that the flag statute was vague on its face when measured against the due process clause of the Fourteenth Amendment. It is submitted, then, that the First Circuit Court erred in reaching a facial vagueness challenge in the circumstances of this case since the appellee never pressed that issue in the Supreme Judicial Court. Delicate federal-state relations are certainly subject to an unnecessary strain if a state court is denied the initial opportunity to construe the enactments of its legislature in the light of a *specific* constitutional challenge. Nothing in the record before the First Circuit Court indicated "either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. §2254(b).

The construction and interpretation of state statutes

are exclusively state court functions. See, *e.g. Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50 (1941); *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163-164 (1943); *Younger* v. *Harris*, 401 U.S. 37, 52 (1971). This exclusive function should not easily be usurped by a federal court especially in the circumstances of a federal habeas corpus petition where 28 U.S.C. 2254(b) has full application. The doctrine of exhaustion of state remedies does apply to the question of whether a state prisoner has completed both an "as applied" and a "facial" challenge to his conviction under a state statute. *Wilson* v. *Gooding*, 303 F. Supp. 952, 953 (N.D. Ga. 1969), *aff.* 431 F.2d 855, 856 (5th Cir. 1970), *aff. sub. nom. Gooding* v. *Wilson*, 405 U.S. 518 (1972).

It is submitted that the First Circuit Court impermissibly extended the scope of review in a federal habeas corpus proceeding. In reaching an analysis of whether the flag statute was vague *on its face*, the First Circuit apparently concluded that the failure of the Supreme Judicial Court to conduct a like analysis was "plain error." It is, of course, the federal rule that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). But this rule has no application in the context of a federal habeas corpus proceeding.

> "The whole history of the writ — its unique development — refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." *Townsend* v. *Sain*, 372 U.S. 293, 311 (1963).

Certainly, no particular form of words or phrases is essential to raise a constitutional issue in a state court. However some recognizable standard is required. A constitutional issue should be presented to a state court with

fair precision. This minimum standard was not met in this case as to the facial vagueness of the statute.

In addition to the applicability of the doctrine of exhaustion of state remedies, appellant urged the First Circuit Court not to undertake a facial vagueness analysis of the statute because of the principle expressed in *United States* v. *Raines*, 362 U.S. 17, 21 (1960):

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

The First Circuit found that two of the exceptions to the *Raines* principle applied in the instant case (Jur. St. 25):

> "Thus, where a statute has already been declared unconstitutional in a large number of its intended applications, and it appears that it was not intended to stand as valid in the few remaining fortuitous situations to which it might apply, *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913); or where a state court has declared valid one provision or application of a statute which is inextricably tied up with an invalid one, *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924) — in such circumstances the broad constitutional challenge may be mounted." (footnote omitted).

It is difficult to fathom how these two exceptions apply to this case. Even assuming that the First Circuit was correct in the amazing way it read these exceptions,[2] they simply do not apply to the Massachusetts flag statute.

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[2] The First Circuit said (Jur. St. 25): "We read these exceptions as not depending upon the historic fortuity that a statute has already been subject to such holdings but as depending upon the probability of such holdings invited by the wording of the statute."

It is clear that the Massachusetts statute divides easily into two parts. The first twenty-six words are directed toward flag desecration; the remainder of the statute deals with commercial exploitation of the flag. There is near unanimous agreement that the states have a legitimate interest in enacting legislation to prevent commercial exploitation of the flag. Moreover, most legal authorities agree that narrowly-drawn legislation aimed at protecting the physical integrity of the flag is valid. In citing the *Butts* exception, the First Circuit seems to be saying that when the Massachusetts legislature enacted the statute in 1899, its basic intent was to penalize words about or gestures towards the flag rather than acts that impinge upon the flag's physical integrity. This rather gratuitous conclusion is not supported by either a fair reading of the statute or the history of the statute's application in Massachusetts from 1899 to the present date.

Nor does the *Dorchy* exception apply here. If the Massachusetts Supreme Judicial Court found itself faced with a case where the facts presented could not fairly be construed as contemptuous treatment of the flag, the Court could issue restrictive guidelines[3] as to the application of the statutory language or could excise[4] the offending language from the statute.

Neither *Butts* nor *Dorchy* reached this Court by way of appealed federal habeas corpus proceedings. Thus, the more relevant question in this case is not whether the *Raines'* principle or the *Raines'* exceptions apply, but

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[3] See discussion *infra*, page 21, as to cases where the Supreme Judicial Court of Massachusetts has placed restrictive guidelines on statutory language.

[4] Federal courts have had little difficulty in finding that portions of state flag statutes were severable. *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 748 (S.D. Ill. 1971); *Hodson* v. *Buckson*, 310 F. Supp. 528, 533 (D. Del. 1970), *rev. on other grounds sub nom. Hodson* v. *Stabler*, 444 F.2d 533 (3rd Cir. 1971).

whether the First Circuit Court violated the delicate federal-state comity policies underlying the federal habeas corpus statute. It is submitted that said policies have been clearly violated.

II. The Statute Is Not Vague On Its Face.

Assuming, *arguendo*, that the First Circuit could properly analyze Mass. Gen. Laws, ch. 264, §5 against an allegation of facial vagueness, it is submitted that the Court wrongly decided that issue.

The First Circuit, in finding the Massachusetts statute vague on its face, relied heavily upon three recent decisions of this Court both as to appellee's standing[5] to challenge the statue on its face (Jur. St. 26-27) and as to the legal principles applicable (Jur. St. 28). *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), involved a vagrancy ordinance; *Colten* v. *Kentucky*, 407 U.S. 104 (1972), addressed itself to a subdivision of the state's disorderly conduct statute; and *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), dealt with an antinoise ordinance. The *subject matter* covered by each of these statutes is by its very nature both broad and indefinite. However, application of the subject matter of the statute to a "particular context" can do much to eliminate claims of facial vagueness.

> "Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, gen-

[5] Appellant relies upon the argument set forth at pages 8-13 of this brief as to why the issue is more properly designated as appellee's failure to exhaust state remedies (i.e., failure to present the issue to the Supreme Judicial Court) than as a question of appellee's standing to raise facial vagueness.

> eral "breach of the peace" ordinance, but a *statute written specifically for the school context*, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." (footnote omitted). *Grayned* v. *City of Rockford, supra,* at 112. (Emphasis supplied).

The Rockford antinoise ordinance was upheld. The Jacksonville vagrancy ordinance did not withstand constitutional scrutiny. Of course it was impossible to put the Jacksonville ordinance into a "particular context". Mr. Justice Frankfurter's dissent in *Winters* v. *New York*, 333 U.S. 507 (1948) is apposite (at p. 540):

> "Only a word needs to be said regarding *Lanzetta* v. *New Jersey*, 306 U.S. 451. The case involved a New Jersey statute of the type that seek to control "vagrancy." These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particlar offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in *by the text of the statute or by the subject matter* so as to give notice of conduct to be avoided." (Emphasis supplied).

Certainly, the subject matter of ch. 264 §5 is much narrower than that involved in either *Papachristou, Colten* or *Grayned*. Because the subject matter of the statute is the flag of the United States and the flag of Massachusetts, it is clear that the conduct the statute proscribes must al-

ways necessarily occur in a "particlar context" — i.e., conduct that is intimately related to either the American or state flag. As in *Grayned, supra,* at 112, we are not dealing with a vague "breach of the peace" statute, but with a statute proscribing certain conduct that touches a readily identifiable, physical object.[6]

That readily identifiable, physical object, insofar as the anti-desecration words of the statute have application, is an actual flag of the United States or of Massachusetts. The phrase "any representation [of the flag]"[7] does not appear in the anti-desecration section of the statute but only in those sections directed towards commercial misuse. Since the anti-desecration words of the statute apply only to actual American and Massachusetts state flags fair notice is given of what the statute proscribes. The Massachusetts statute does not address itself to emblems, buttons or devices that might be said to be *similar* to the flag. Compare *Long Island Vietnam Moratorium Comm.* v. *Cahn,* 437 F.2d 344, 350 (2nd Cir. 1970), *appeal docketed sub nom. Cahn* v. *Long Island Vietnam Moratorium Comm.,* No. 70-102, March 24, 1971; *Hoffman* v. *United States,* 445 F.2d 226 (D.C. Cir. 1971). Moreover, the Massachusetts statute does not attempt to expropriate the colors and design of the flag by expanding the flag

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[6] Although the First Circuit at one point in its analysis (Jur. St. 37) recognized the specific and unique subject matter of the statute, it did not relate this recognition to a solution of "vagueness-notice" problems apparently because it felt that nearly all conduct involving the flag was closely akin to pure speech (Jur. St. 37-40 and footnote 18).

[7] Appellee, in his brief to the Supreme Judicial Court, stated that the Massachusetts legislature, by the Acts of 1971, Chapter 74, amended the statute by inserting the phrase "or any representation thereof." (App. 27). This is not accurate. It appears that the phrase "any representation thereof" has been in the statute since its original enactment in 1899. The Acts of 1971 Ch. 74 amendment in fact modified the first sentence by inserting the phrase "burns or otherwise" after the second word of the sentence and further amended the statute by increasing the fine to "not less than one hundred dollars."

definition to include "standard, colors, ensign, or any picture or representation of either, or of any part or parts of either . . . ." 18 U.S.C. §700(b). Compare *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D. N.Caro. 1971); *Thoms* v. *Heffernan*, 473 F.2d 478 (2nd Cir. 1973), *petition for cert. filed sub nom. Heffernan* v. *Thoms*, No. 72-1359, April 9, 1973; *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 742 (S.D. Ill. 1971); *Long Island Vietnam Moratorium Comm.* v. *Cahn*, *supra*, at 345; *Crosson* v. *Silver*, 319 F. Supp. 1084, 1089 (D. Ariz. 1970).

Not only does a prospective offender have to engage in conduct that impinges upon the physical integrity of an actual flag in order to violate the statutory mandate, but he must also be shown to have *intended* to violate the statute. The citations in the Supreme Judicial Court opinion on the issue of "intent" make this point quite clear (App. 38). Of course, the "requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952) (footnote omitted). Inadvertent or careless conduct touching the flag is not proscribed by the statute unless conduct of that sort is so egregious as to rise to a level of willful neglect. See *Boyce Motor Lines, Inc.* v. *United States*, *supra*, at 342.

The First Circuit did not address itself to the element of "intent" though it cannot be gainsaid that this element is directly relevant to "vagueness-notice" problems.

> "The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on

> trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. [citation omitted]. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States,* 325 U.S. 91, 101-102 (1945).

Why the First Circuit did not mention the narrow subject matter of the Massachusetts statute or the necessity of proving "intent" is unknown. But in reading the opinion one gets the unmistakable impression that since the First Amendment overbreadth conclusions were to be so expansive, the Fourteenth Amendment vagueness discussion would necessarily have the flavor of a bootstrap analysis.

In addition to the narrow subject matter of the statute and the necessity of proving culpable intent, other means show how to "extrapolate its allowable meaning . . . ." *Garner* v. *Louisiana,* 368 U.S. 157, 174 (1961) (Frankfurter, J., concurring).

> Here, we are "relegated . . . to the words of the ordinance itself," to the interpretations the court below has given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. *Grayned* v. *City of Rockford,* 408 U.S., *supra,* at 110. (footnotes omitted).

The First Circuit found the statutory words "treats contemptuously" to be impermissibly vague (Jur. St. 33). Certainly that phrase is not as specific as "mutilates, tramples upon [or] defaces" — the words preceding "treats contemptuously." But that fact alone is no reason why ordinary principles of statutory construction must be eschewed.

The following principle of statutory interpretation was pressed upon First Circuit by the appellant (without success): when general and specific words are associated with each other, they take "color" from each other such that the more general words are restricted to a sense analogous to the more specific. 2 Sutherland, Statutory Construction §4909 (3rd rev. ed. Horack 1943). The Supreme Court of New Hampshire had no difficulty in applying this principle to the phrase "cast contempt" in its flag statute such that the Court concluded that the phrase was limited to acts of physical desecration similar to those previously enumerated in the statute. *State* v. *Royal*, — N.H. —, 305 A.2d 676, 679 (May 31, 1973). This same principle of statutory interpretation has long been recognized and applied in the courts of Massachusetts. *Koller* v. *Duggan*, 346 Mass. 270, 191 N.E.2d 475 (1963); *Hodgerney* v. *Baker*, 324 Mass. 703, 88 N.E.2d 625 (1949); *Meunier's Case*, 319 Mass. 421, 66 N.E.2d 198 (1946); *Kenney* v. *Building Commissioner of Melrose*, 315 Mass. 291, 82 N.E.2d 683 (1944).

When the Supreme Judicial Court of Massachusetts has been presented with facial vagueness challenges to analogous state statutes, it has made careful analyses in order to protect constitutional rights. If the allegedly vague statutory language did not easily lend itself to a restrictive interpretation, the statute was declared unconstitutional. Thus in *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N.E.2d 666 (1950), a loitering statute was found to be unconstitutionally vague. The Court was faced with

vagueness challenges to five different statutes in *Alegata* v. *Commonwealth*, 353 Mass. 287, 231 N.E.2d 201 (1967). Four of the statutes were declared void. However, the "disorderly conduct" statute was upheld. The Court construed the statutory language narrowly and gave "disorderly conduct" the same meaning as given to that concept by Section 250.2 of the Model Penal Code (Proposed Official Draft), even though that definition was obviously not available to the legislature when the statute was enacted in 1943.

In *Thomes* v. *Commonwealth*, 355 Mass. 203, 243 N.E.2d 821 (1969), the Court upheld the "definiteness" of the phrase "common night walkers" by construing it to apply only to persons abroad at night soliciting people to have illicit sexual intercourse. And in *Commonwealth* v. *Jarrett*, 1971 Mass. Adv. Sh. 833, 269 N.E.2d 657 (1971), the Court found that the "disturbers of the peace" statute passed constitutional muster. In construing the statute the Court stated (at 840, 269 N.E.2d at 662):

> "The mere making of statements, or expressing of views or opinions, no matter how unpopular, or views with which persons present to not agree, has never been and is not now punishable as a disturbance of the peace under the law of the Commonwealth."

See also *Commonwealth* v. *Brasher*, 1971 Mass. Adv. Sh. 907, 270 N.E.2d 389 (1971), regarding the "stubborn child" statute. It is submitted that since the Supreme Judicial Court has shown itself ready to analyze state statutes when faced with arguments of facial vagueness in the cases just cited, the reason no such analysis exists in this case is because the appellee failed to make such an argument.[8]

The written interpretations given to the flag statute

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[8] See argument *supra* at pages 8-11.

by Massachusetts law enforcement authorities over the years have not specifically dealt with the initial anti-desecration section of the statute. 4 Opinions of Att. Gen. 470-473 (1915); Report of Att. Gen., Pub. Doc. No. 12 (1968) 192-193.[9] However, both of these opinions illustrate that the highest police authority in the Commonwealth has shown himself ready to interpret this penal statute narrowly as state law requires (Jur. St. 54 and case cited).

It is submitted that since the subject matter of the statute is inherently narrow, since it is necessary to prove culpable intent to establish a violation of the statute, and, since there are several other indicia in Massachusetts law evidencing a specific meaning to the statute for those people who desire to obey it [*Colten* v. *Kentucky*, 407 U.S., *supra*, at 110], the statute is not impermissibly vague. To paraphrase *Grayned, supra* at 113: the vagueness of the phrase "treats contemptuously" is dispelled by the statute's requirements that (1) the contemptuous treatment of the United States flag be direct and immediate; (2) that the contemptuous treatment actually impinge upon the physical integrity of the flag; and (3) that the act be wilfully done.

III. The Statute Is Not Overbroad Either On Its Face or as Applied to Appellee.

A. *The Statute on Its Face.*

The Supreme Judicial Court rejected appellee's argument that the statute acted as a restraint upon the right to freedom of speech either on its face or as applied to

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[9] The 1915 opinion is reproduced as an appendix to this brief for the convenience of the Court, pages 30-33. The 1968 opinion can be found reproduced in the Jurisdictional Statement at pages 53-55.

him (App. 37). The First Circuit found the statute to be facially overbroad (Jur. St. 48).

If one accepts the First Circuit's unique starting point, the remainder of its analysis follows logically. That starting point can be summarized as follows: "[T]he flag [of the United States] has a meaning — a very special meaning — historically associated with support of our form of government and its majestic presence." (Jur. St. 37); it "... speak[s] by itself as a symbol of the United States of America ...." (Jur. St. 37); it is "[s]uch a primary symbol .... [that] any individualized activity with regard to it ... is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.'" (Jur. St. 38). The fatal flaw in this reasoning is the attempt to circumscribe the "very special meaning" of the flag. Undoubtedly the flag is a symbol of the United States. And in many instances the use of the flag is associated with governmental authority on both the federal and states levels. And the flag can represent our democratic form of government and everything associated with that government since 1776. But all of these concepts come no where near exhausting the meaning of the flag or explaining what is encompassed by the phrase "United States of America." In truth the flag has millions of meanings — as many meanings and nuances as rational beings are capable of appreciating.

Appellant submits that the First Circuit's definition of the meaning of the flag is so truncated that the Court in effect wiped out any legitimate state interest in flag legislation *a priori*. By assimilating the symbolic content of the flag to mean the "... promotion of loyalty and patriotism" (Jur. St. 41) the First Circuit set up a straw man and then found that the straw man could offer no legitimate reason for flag legislation.

Courts that have upheld the constitutionality of state flag legislation have found several valid state interests:

(1) its interest in the preservation of the flag as a symbol of unity on national ideals and purpose. *Sutherland* v. *DeWulf, supra* at 744;

(2) its interest in the preservation[10] of the public peace. *Ibid.; State* v. *Royal,* — N.H. —, 305 A. 2d, *supra* at 680; and

(3) its interest in protecting the physical integrity of the flag. *Ibid.*

None of these formulations really gets at the essence of the states' interest in flag legislation. The flag of the United States is *sui generis* as is any other distinctive flag. Hence, any formulation of the states' interest is going to be difficult to verbalize. It is submitted, though, that the following quotation from *Parker* v. *Morgan,* 322 F. Supp. 585 (W.D. No. Caro. 1971) best captures the states' interest (at 588):

> "We reject plaintiff's argument that because the national flag is a symbol it is always "saying" something, and because it says something control of its display and usage is outlawed by the freedom of speech clause of the First Amendment. The argument is based on a false premise: that what the flag stands for can be authoritatively stated, i.e., that it represents government and/or official policy. If the flag says anything at all, and we agree it often may in a given context, we think it says everything and is big enough to symbolize the variant view-points of a Dr.

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[10] Appellant recognizes that the states' interest in the *preservation* of the public peace is less substantial than their interest in preventing imminent breaches of the peace. An undifferentiated fear of a disturbance is not a sufficient state interest, standing alone, to justify restrictions on First Amendment rights. *Cohen* v. *California,* 403 U.S. 15, 23 (1971). However, it is submitted that in the area of flag desecration, the states' interest in the preservation of the public peace amounts to more than an undifferentiated fear. *Halter* v. *Nebraska,* 205 U.S. 34, 41 (1907) (*dictum*).

Spock and a General Westmoreland. With fine impartiality the flag may head up a peace parade and at the same time and place fly over a platoon of soldiers assigned to guard it.

The flag has never been a trademark of government. It is not "official" in the sense that its display is limited to the Army or the Navy or to public buildings of for state occasions. It no more belongs to the President than it does to the most private citizen. It may be flown, and often is, over the YMCA and the Jewish synagogue, the Peace Corps and the Army post, the American Federation of Labor and General Motors. It belongs as much to the defeated political party, presumably opposed to the government, as it does to the victorious one. Sometimes the flag represents government. Sometimes it may represent opposition to government. Always it represents America — in all its marvelous diversity."

There is no evidence in the record before this Court, nor is there any historical evidence, that the Massachusetts legislature enacted the statute in order to restrict the exercise of First Amendent rights. It does not appear that in 1899 anybody was claiming to be exercising First Amendment rights by desecrating the United States flag. The motivation of the Massachusetts legislature, therefore, is not suspet. Compare *O'Brien* v. *United States*, 376 F.2d 538, 540-541 (1st Cir. 1967), *judgment vacated sub nom. United States* v. *O'Brien*, 391 U.S. 367 (1968).

If this Court agrees that the states have a legitimate and cogent interest in passing flag legislation then it follows that the Massachusetts statute "... no more abridges free speech *on its face* than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." *United States* v. *O'Brien*, 391 U.S. 367, 375 (1968) (emphasis supplied).

Appellant submits that the First Circuit is wrong in holding that all intentional conduct that amounts to a desecration of the flag is necessarily expressive of some idea that is protected by the First Amendment (Jur. St. 38, 41-42). Using a flag as a picnic blanket [*State* v. *Bunch*, 26 Ohio Misc. 164, 54 Ohio Ops.2d 354, 268 N.E.2d 831 (1970)] or as a car seat cover [*State* v. *Sinniger*, 486 P.2d 1303 (Ct. of App., Ore. 1971)] does not express any idea—symbolically or otherwise.

Courts and commentators have recognized that an act of flag desecration *may be* expressive of a particular idea *depending* upon a number of variables—the specific location where the act occurred, the immediate political climate, or the intent of the actor—to name but a few. *Parker* v. *Morgan, supra*, at 588; *United States* v. *Crosson*, 462 F.2d 96, 102 (9th Cir. 1972), *cert. den. sub nom. Crosson* v. *United States*, 409 U.S. 1064 (1972); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 862 (1971); T. Emerson, The System of Freedom of Expression 87 (Vintage Ed. 1971). This recognition is of recent origin, paralleling the development of the concept of "symbolic speech". Fifteen years ago appellee's overbreadth contentions would have received short shrift in any court of law. This fact supports appellant's argument that the Massachusetts statute was not and is not now directed at the suppression of ideas. It is only when an indefinite number of variables are carefully interwoven in a given context that First Amendment considerations arguably come into play.

The Massachusetts interest in its flag legislation could probably be seen more clearly upon a slightly different and less emotional set of facts—e.g., if appellee had been wearing a Massachusetts state flag, or a Polish flag, or a Nigerian flag, or a Canadian flag, etc.[11] Few people

[11] In 1912 the Massachusetts legislature enacted a foreign flag statute which has remained unchanged to the present date. Now

would argue that the state does not have a valid interest in preventing public acts of desecration of such flags. Fewer people would argue that the state was attempting to promote loyalty and patriotism for Poland, Nigeria, Canada, etc. Massachusetts' comprehensive flag legislation is not aimed at eliciting affirmative acts of respect or at "promoting patriotism" (Jur. St. 41) but rather at preventing public acts of desecration that readily evoke violence. See *Halter* v. *Nebraska*, 205 U.S. 34, 41 (1907). Speech, pure or otherwise, is not intrinsically wedded to the acts ch. 264 §5 proscribes. To hold that the statute, on its face, infringes upon First Amendment rights is to read the Amendment to mean that any action, no matter how destructive, is privileged so long as the actor asserts that he was conveying an idea. See, *Street* v. *New York*, 394 U.S. 579, 616-617 (1969) (Fortas, J., dissenting).

Moreover, the statute in no way deprives anyone from using the flag in public. The Supreme Judicial Court has indicated that speech, no matter how contrary or defiant, is not proscribed by the statute (App. 37). Protesters of all political persuasions are free to make use of the flag in their demonstrations. The statute reaches only intentional acts that affect the physical integrity of United States flags.[12]

The statute is not overbroad on its face.

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codified as Mass. Gen. Laws, ch. 264 §7 it reads: "Foreign flags; misuse; penalty — Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag or emblem of a foreign country at peace with the United States, whether such flag or emblem is public or private property, or whoever displays such flag or emblem or any representation thereof upon which are words, figures, advertisements or designs, shall be punished by a fine of not less than five nor more than fifty dollars."

[12] That the statute is directed only at *actual* flags of the United States was further clarified by a recent admendment. The Acts of 1971, ch. 655 (approved August 12, 1971) added the following at the end of the statute: "For the purposes of this section the term 'flag of the United States' shall mean any flag which has been designated by Act or Resolution of the Congress of the United States as the national emblem, whether or not such designation is currently in force."

B. *The Statute As Applied To Appellee.*

Appellee was convicted of treating the United States flag contemptuously because of his act of wearing a cloth flag on the seat of his trousers. Through his counsel, appellee contended in the Supreme Judicial Court that the conduct he engaged in should be classified as "symbolic speech" (App. 13).[13] However, nothing in the record before this Court indicates that the question of "symbolic speech" was, "... in the first instance, determined as a factual matter by the trial court. Further, there is no indication that ... [appellee] either presented evidence on this question at trial or urged any standard at trial for determining this issue." *Cowgill* v. *California*, 396 U.S. 371, 372 (Harlan, J., concurring in dismissal).

The record in this case does not disclose a "communicative element" other than the allegations of appellee's counsel. Absent a clear communicative aspect to appellee's conduct, First Amendment considerations do not apply. See *United States* v. *O'Brien, supra*, at 376.

Even if it be assumed that appellee was engaging in speech it is submitted that the quadripartite test set forth in *O'Brien* (at 377) has been met in this case. Apparently only the First Circuit contends that the states cannot enact narrowly-drawn flag desecration statutes. The discussion at pages 22 through 25 of this brief sets forth Massachusetts' strong and legitimate interest in flag legislation and shows that this interest is not aimed at the suppression of speech. A host of other indicia evidence that any incidental restriction ch. 264 §5 may have on alleged First Amendment freedoms will indeed be minimal. The Supreme Judicial Court has construed the statute such that it does

[13] It should be noted that appellee's counsel is not entirely sure what "idea" appellee was allegedly conveying by his conduct (Brief to Supreme Judicial Court, App. 13).

not apply to pure speech directed at the flag (App. 37) nor to inadvertent or careless acts that touch the flag (Ap. 38). The subject matter of the statute, being restricted to *actual flags and flags alone,* is narrower than any other flag statute presently in effect in the United States. A fair reading of the statute and supportive Massachusetts case law show that the acts proscribed are those that impinge upon the physical integrity of the flag. Wearing a flag on one's derriere is conduct within the statutory proscription; application of statute to the appellee did not violate his First Amendment rights.

Conclusion

For all of the foregoing reasons, the appellant respectfully requests this Court to reverse the judgment of the court below.

Dated: Boston, Massachusetts, July 19, 1973.

Respectfully submitted,

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APPENDIX

OPINION OF THE ATTORNEY GENERAL

4 Opinions of Att. Gen. 470-473 (August 6, 1915)

To the Chief of the Massachusetts District Police:

I acknowledge your letter requesting my opinion as to whether certain pictures submitted to me by you are in violation of R. L., c. 206, § 5, as amended by St. 1913, c. 464, and St. 1914, c. 570. That statute is as follows:—

> Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or who shall in this commonwealth expose to public view, manufacture, sell, expose for sale, give away or have in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through a wrapping or otherwise engraved or printed in any manner, a representation of the United States flag, shall be punished by a fine of not less than ten nor more than one hundred dollars; but a flag which belongs to a grand army post, to a camp of the legion of Spanish war veterans or which is the property of or is used in the service of the United States or of this commonwealth may have the names of battles and the name and number of the organization to which such flag belongs inscribed thereon. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, the flag or any representation thereof in such manner that the flag or its representation is used to

attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this act be deemed to be upon the flag.

The purpose of this statute, as declared in the title of the act of 1913, is "to prohibit the misuse of the national and the state flags." It should be interpreted in the light of this purpose with a view to increase respect for our flags and, if possible, not in such a manner as to restrict the proper use of the flags or to reduce the statute to an absurdity. It apparently seeks to prohibit three things, namely, first, insults to the flags; second, their use as a part of any form of advertising, and third, the engraving or printing of a representation of the United States flag upon any article of merchandise or any wrapper or receptacle of articles.

Acts coming within the first prohibition are readily recognized. The extent of the prohibition of the use of the flags for advertising purposes is indicated with reasonable plainness by the last sentence of the statute, added by the amendment of 1914. The chief difficulty comes in applying the third prohibition. It forbids the exhibition, manufacture, sale, exposure for sale, gift or possession for any purpose of "any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which shall be attached through a wrapping or otherwise engraved or printed in any manner, a representation of the United States flag." The broad term "any article or substance" is somewhat limited by the words immediately following, "being an article of merchandise or a receptacle of merchandise or articles." In a broad sense, however, a card or a sheet of paper upon which a picture of a flag has been printed, or a piece of cloth upon which the colors constituting it have been stamped, is an article of merchandise. Obviously, it would seem that the Legislature never intended to use the language of this statute in any such broad sense. Such an interpretation would

make it a criminal offence to possess or to display not only any picture of the flag whatever, but even the flag itself in many of its cheaper and more common forms. Such an interpretation would prohibit the use, not merely the misuse, of the flag, and would reduce the statute to a manifest absurdity. Thus interpreted the statute would probably be void as an unreasonable police regulation.

In my opinion the clause under discussion must be read together with the preceding clause forbidding the use of the flag for advertising purposes, and is to be considered merely as an extension of that prohibition. It should be interpreted merely as forbidding the engraving or printing of the flag, whether for advertising or decorative purposes, upon wrappers or receptacles, or upon articles, which are themselves complete articles of merchandise aside from the presence of a representation of the flag upon them. Thus an article of which the representation of the flag is an inherent part, which could not be the complete article intended without the representation of the flag, and to which the representation of the flag is not a mere ornamental and unessential addition, does not, in my opinion, come within the prohibition of the statute. Unless such an article violates some other portion of the statute its possession or use is not forbidden.

It follows that a picture or printed representation of the flag alone, or a picture containing it as a *bona fide* part of the picture, as, for example, displayed upon a building, is not a violation of this statute when engraved or printed upon a card or in or upon a book, paper or magazine, provided such picture is not used or intended to attract attention to or advertise such book, paper, magazine or card or its contents, or any other thing or matter. Accordingly, I advise you that the picture post-cards submitted by you to me, one bearing merely a representation of the flag entitled "Old Glory," and the

others being pictures of actual buildings upon which one or more flags are displayed, as they do not appear to be used for any advertising purpose, are not in violation of law.

The use of pictures containing representations of the flag upon the covers of books, papers or magazines will often present a question of some difficulty. Such pictures, so used, do not necessarily come within the third prohibition of the statute as interpreted by me. Thus they do not violate its terms unless they are used or intended for advertising as defined in the statute. If such a picture is used or intended solely for artistic or ornamental purposes, and is in no way used or intended to attract attention to the book, paper or magazine or its contents as it is offered for sale, there is, in my opinion, no violation of the law. If, however, any part of the use or purpose of such a cover is to attract attention to and advertise the publication or its contents, the second prohibition of the statute has been violated. Each case must stand by itself.

With reference to the cover of the Boston Sunday Post Magazine of July 4, 1915, submitted to me, it is my opinion that it was not a violation of law. Though its date indicates that it was intended to give a patriotic flavor to the publication, there is, in fact, no representation of the United States flag printed upon it. Red and white stripes with no field of blue or stars cannot be said to be such a representation when it is not obvious that it is intended to depict a portion of the flag. The cap represented on this cover may have been made of any piece of goods colored as indicated. It is the flag itself, not the colors that compose it, that the statute is devised to protect.

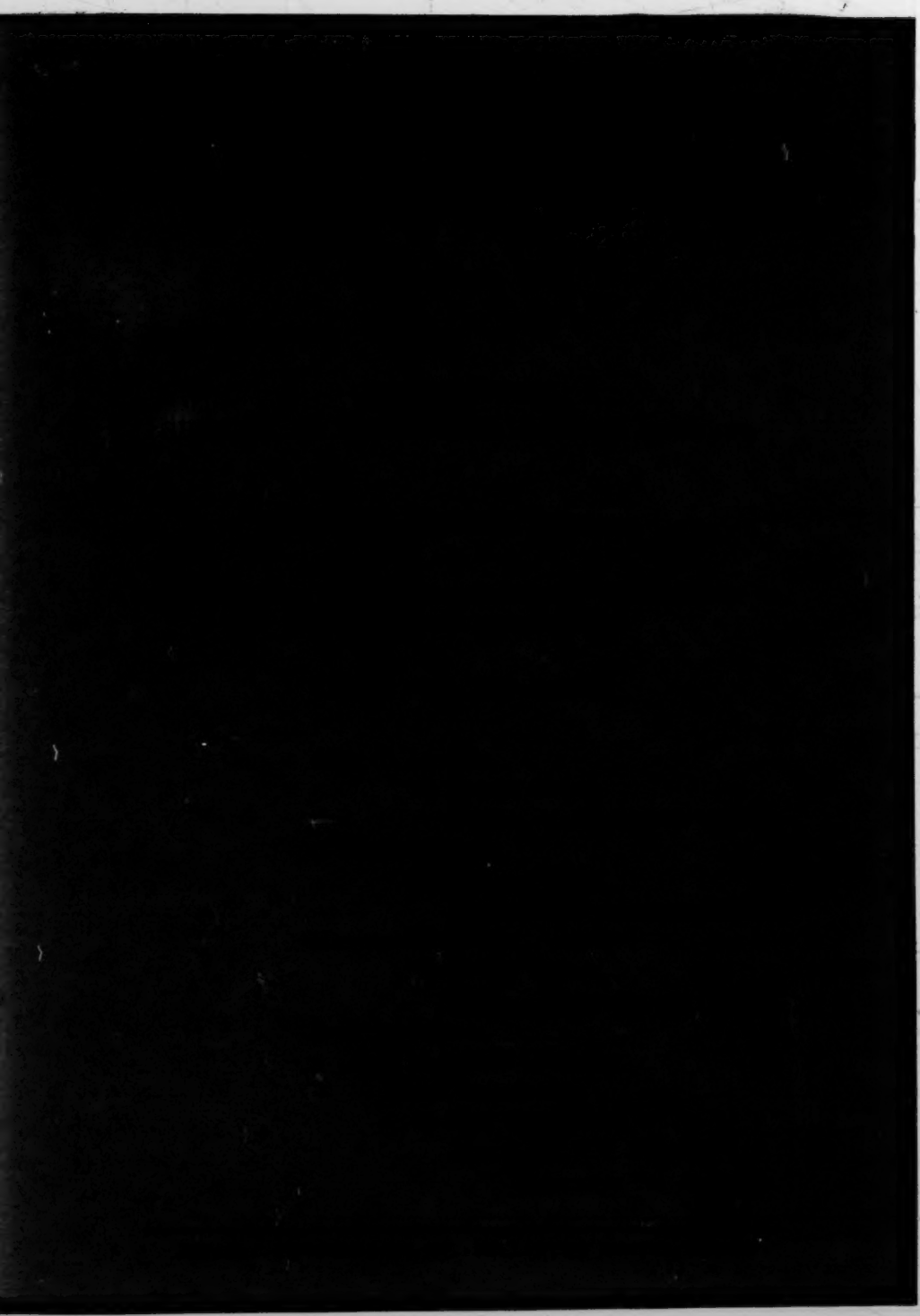


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Supreme Court of the United States.

October Term, 1973.

No. 72-1254.

JOSEPH SMITH,
SHERIFF OF WORCESTER COUNTY, Appellant,
v.
VALERIE GOGUEN, Appellee.

ON APPEAL FROM A JUGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR APPELLEE.

Questions Presented.

1. Whether Massachusetts General Laws, c. 264, § 5, is, on its face and as applied to appellee, unconstitutionally vague in violation of the Fourteenth Amendment?
2. Whether Massachusetts General Laws, c. 264, § 5, is, on its face and as applied to appellee, unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

Statement of the Case.

Appellee adopts in full appellant's statement set forth in the Brief for Appellant, pages 5-6.

Summary of Argument.

I.

A. Appellant is barred from claiming that appellee failed to exhaust his available state remedies (28 U.S.C. 2254(b)) since appellant admitted exhaustion in his return (App. 44) and failed to raise the claim in both lower federal courts.

B. The facial vagueness of Massachusetts General Laws, c. 264, § 5 (hereafter the statute), was considered and decided by the state court when it held that the statute was not vague as applied to appellee.

C. Appellee may properly challenge the statute as facially vague in violation of the Fourteenth Amendment. The nature of his conduct is not reasonably distinguishable from other behavior sought to be proscribed. The statute is incapable of clarification so as to provide fair notice to other potential offenders as to what is proscribed. An interpretation distinguishing appellee's behavior from that of others is unwarranted in light of the statute's language and purpose.

D. The statute is vague on its face and as applied to appellee since it gives no fair warning as to what conduct is proscribed, leaving the police and the courts with unbridled discretion to enforce it. This defect cannot be remedied by a narrowing construction of the statute.

II.

Massachusetts cannot constitutionally utilize criminal sanctions to enforce respect for the flag of the United States. The First Amendment disables Massachusetts from compelling any person to render ritualistic obeisance to an emblem of the State, whether by being ordered to salute it or by being ordered to observe a series of taboos concerning its use or display.

III.

A. The First Circuit was correct in holding the statute unconstitutionally overbroad in violation of the First Amendment. Since the statute reaches "pure speech" and is incapable of remedial excision, it is unconstitutional on its face. Moreover, it causes a substantial restriction on symbolic expression and fails to meet the quadripartite test of *United States* v. *O'Brien*, 391 U.S. 367 (1968).

B. The statute as applied to appellee is unconstitutionally overbroad since appellee's conduct is a form of expression entitled to First Amendment protection and no state interest in support of the statute justifies its application to him.

Argument.

I. The First Circuit Court Properly Found Massachusetts General Laws, c. 264, § 5, Unconstitutionally Vague on its Face.

A. *Appellant May Not Raise the Issue of Exhaustion of State Remedies for the First Time in this Court.*

Appellant argues for the first time in this Court that appellee did not argue to the Supreme Judicial Court of Massachusetts that Massachusetts General Laws, c. 264, § 5, was unconstitutionally vague on its face. Therefore, appellant now claims that appellee failed to exhaust his state remedies in violation of 28 U.S.C. 2254(b). (Brief for Appellant, 7-13.)

In the District Court, appellee attacked the statute as being in violation of the First Amendment guarantee of freedom of speech and the Fourteenth Amendment guarantee of due process of law because it is overly broad and impermissibly vague both on its face and as applied to

appellee (App. 43). Appellant admitted in his return that appellee had properly exhausted his state remedies (App. 44), and the District Court found that appellant had made no claim that the issues raised by appellee were not appropriately raised in the state proceedings.[1]

Then, having admitted that appellee did exhaust his state remedies in the District Court, appellant did not present such a claim to the First Circuit. Instead, appellant only argued that the First Circuit should not consider both facial vagueness and overbreadth because appellee should not be permitted to avail himself of potential constitutional claims of others. *Goguen* v. *Smith*, 471 F. 2d 88, 90-91 (1st Cir. 1972).

Thus, appellant's argument that appellee did not exhaust his state remedies as to the facial vagueness claim is barred by appellant's admission in his return and the rule that a party cannot raise on appeal for the first time in this Court an issue never raised or considered below. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334 (1959); *Jesionowski* v. *Boston & Maine Railroad*, 329 U.S. 452 (1947); *United States* v. *New York Telephone Co.*, 326 U.S. 638 (1946).

B. *The Facial Vagueness of the Statute was Decided by the State Court when it Held that the Statute was Not Vague as Applied to Appellee.*

Assuming *arguendo* that the exhaustion issue is properly before this court and has not been waived, appellant is incorrect in concluding that the Supreme Judicial Court of

[1] "No contention is now made that the petitioner has not exhausted state remedies, nor that the constitutional issues presented here were not raised appropriately in state proceedings." *Goguen* v. *Smith*, 343 F. Supp. 161, 164 (D. Mass. 1972).

Massachusetts did not consider the issue of facial vagueness.[2]

Although it is difficult to determine from the confusing opinion of the Supreme Judicial Court which issues were actually analyzed, it was apparent to the state court from the amended bill of exceptions that appellee raised the issue of facial vagueness under the Fourteenth Amendment (App. 1). Moreover, appellant was certainly aware that the issue was before the state court because it was argued in the Commonwealth's brief before that court.[3] Unlike the cases cited by appellant at page 10 of his brief, the state court did not state that it treated the facial vagueness question as waived, nor did it invoke its Rule 1:13.

Although the Supreme Judicial Court of Massachusetts dismissed the issue of vagueness in one sentence,[4] the citations for that summary conclusion indicate that the facial vagueness issue was fairly considered. In each case cited directly the statute involved was analyzed for both overbreadth and facial vagueness but found to withstand those attacks (see *Sutherland* v. *DeWulf*, 323 F. Supp. 740, 746-749 (S.D. Ill. 1971) and *Oldroyd* v. *Kugler*, 327 F. Supp. 176, 178 (D. N.J. 1970)).

Moreover, the issue of vagueness "as applied" in the instant case is inextricably tied to the issue of whether the statute is vague on its face. *Goguen* v. *Smith*, 471 F. 2d 88,

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[2] As is demonstrated in part C below the facial vagueness issue in the non-First Amendment context is the total lack of clarity and precision in the term "contemptuously."

[3] "There was no error in denying this motion [to dismiss]. The issue raised in this motion was that G.L. c. 264, § 5, was unconstitutional because it violated the defendant's right to freedom of speech and the statute is overly broad and vague and incapable of fair and reasonable interpretation . . ." (App. 31.)

[4] "Whatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here." (App. 37.)

94. Therefore, in deciding that the statute was not vague as applied to appellee, the state court necessarily decided that it was not vague on its face.

C. *The First Circuit Properly Considered the Appellee's Facial Vagueness Claim on its Merits.*

As appears at part B above, appellee urges that the questions of facial vagueness and vagueness as applied are necessarily merged and may be decided together. Nonetheless, assuming that in a non-First Amendment context the statute is not vague as applied to appellee, he may still avail himself of potential vagueness claims of others to defeat the statute.

The well-known abstinence prescription of *United States* v. *Raines*, 362 U.S. 17, 21,[5] is not controlling here. Rather, the exceptions to the prescription and a close reading of *Raines* itself, compel a rejection of the rule.

> "[W]here a statute has already been declared unconstitutional in a large number of its intended applications, and it appears that it was not intended to stand as valid in the few remaining fortuitous situations to which it might apply, Butts v. Merchants' & Miners' Transportation Co., 230 U.S. 126 (1913); or where a state court has declared valid one provision or application of a statute which is inextricably tied up with an invalid one, Dorchy v. Kansas, 264 U.S. 286, 290 (1924)—in such circumstances the broad constitutional challenge may be mounted. We read these exceptions as not depending upon the historic fortuity that

[5] "[One] to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

a statute has already been subjected to such holdings but as depending upon the probability of such holdings invited by the wording of the statute. From the failure of *Raines* to cite the vagueness cases to which we have referred and in the light of the thrust of the foregoing two exceptions, we think the sense of the doctrine is that if the nature of a party's conduct is not so dissimilar from other behavior sought to be proscribed by a statute, such that an interpretation distinguishing his behavior from that of others would not provide more certain notice to potential offenders and would also seem unwarranted in the light of a legislative determination to cover all such activities, then a void-for-vagueness challenge allows a court to rule on the facial constitutionality of that statute." *Goguen* v. *Smith*, 471 F. 2d 88, 92.

The First Circuit's holding that appellee could mount a facial vagueness attack based upon potential vagueness as to others is especially persuasive in view of this Court's decision in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), where one who was guilty of vagrancy by virtue of his disorderly conduct—resisting arrest—successfully pressed potential vagueness claims of others; *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), where one whose conduct was clearly not vague under an antinoise ordinance was permitted to mount a facial vagueness claim on the merits; and *Colten* v. *Kentucky*, 407 U.S. 104 (1972), where this Court once again considered a facial vagueness claim on the merits after concluding that the statute was not vague as applied.

Appellant attempts to distinguish the foregoing on the ground that the laws involved there were broad in subject matter and the statute here is "much narrower," being

limited only to the "physical integrity" of an actual flag of the United States (Brief for Appellant, 15-18).[8] However, this argument misconstrues the vagueness claim which, accurately delineated, focuses on the phrase "treats contemptuously." "Contemptuously" is certainly as vague, if not more so, as "disorderly," "vagrancy" or "noisy." This case therefore is not distinguishable from *Papachristou*, *Grayned*, and *Colten*, and the First Circuit was correct in determining appellee's facial vagueness claim on its merits.

D. *Massachusetts General Laws, c. 264, § 5, is Vague on its Face and as Applied to Appellee.*

The essence of a claim that a statute is vague is that it is a violation of the Fourteenth Amendment's guarantee of due process of law to impose criminal penalties under a statute which does not give adequate notice of the proscribed conduct. *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963).

Statutes making use of proscriptive words which are otherwise vague may be made adequately definitive by judicial interpretation, *Roth* v. *United States*, 354 U.S. 476 (1957); by being part of a larger regulatory scheme,

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[8] Nothing in the decision of the state court shows that the statute is limited to acts of physical desecration. Appellant urged such an interpretation upon the First Circuit which quite properly rejected it as being without legal support. *Goguen* v. *Smith*, 471 F. 2d 88 (1st Cir. 1972). Moreover, since appellee was convicted for *wearing* the flag, his conduct cannot be said to in any way affect the flag's physical integrity. Thus, the state court must be said to have considered the statute as applying to all acts of contemptuous treatment whether of a physical nature or not. In contrast, the New Hampshire Supreme Court interpreted its flag desecration law to apply only to acts of a physical nature (*e.g.*, burning, tearing, etc.). *State* v. *Royal*, N.H. , 305 A. 2d 676, 679 (1973).

United States v. *Spector*, 343 U.S. 169 (1952); by employing words with a special technical meaning, *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926), or may be under the business regulations exception, *i.e.*, *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952). However, none of those exceptions are present here. *Goguen* v. *Smith*, 471 F. 2d 88.

The vice of vagueness inherent in this statute is the paradigm of lack of fair warning. This is amply demonstrated by appellant's concession at oral argument before the First Circuit that a veteran who used the flag as a head covering in a rainstorm might not be prosecuted. *Id.*, at 102. Thus, the government would permit certain persons to use the flag as an umbrella, but prohibit others from displaying it on clothing. The statute here is nothing more than a net set "large enough to catch all possible offenders," leaving it to the unfettered discretion of the police and the courts to determine which unwary victim is to feel the weight of criminal sanctions. *Papachristou, supra*, at 165.

The First Circuit considered the possibilities of conduct which equally could or could not be deemed contemptuous treatment and observed that not only are such possibilities manifold, but culpability might turn upon such irrational factors as the geographic location of their occurrence.

> "The possibilities of deviation which pose problems of legal forecasting are numerous: waving a flag during a speech critical of foreign or domestic policy; holding a flag while making a face or a contemptuous gesture; climaxing a speech by crumpling a flag; spitting in the direction of a flag—at a safe distance, and at an unsafe distance; wrapping a flag around oneself; displaying the flag against a background, surrounded with derogatory and condemnatory symbols and slogans; the sewing of a flag to a larger patriotic banner, to the jacket

of a bemedalled veteran, to a sleeve of a Boy Scout leader, or even to the back of a motorcyclist's windbreaker. Yet any or none of these actions could be interpreted as 'treats contemptuously.' Since persons in Leominister's business district may have views of what constitutes contemptuous treatment of the flag differing from those of persons in Cambridge's Harvard Square, it is important that the statute give all persons definite notice of what acts are prohibited." *Goguen* v. *Smith*, 471 F. 2d, at 95.

In view of the *Bunch* and *Sinniger* cases (see Brief of Appellant, at 26) where persons were convicted for using the flag as a picnic blanket and as a car seatcover, such examples are not idle speculation.

Appellant makes much of the element of intent as a factor in saving the statute. But if, as in this case, intent is inferred from conduct alone,[7] then the possibilities for application remain limitless and law enforcement officials have equally limitless discretion to choose who shall be prosecuted. The actor still has no standards by which to determine in advance whether a contemptuous intent may be inferred from his conduct.[8]

It may be argued that the statute is designed to protect the "physical integrity" of the flag (Brief for Appellant,

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[7] "The jury could infer that the violation was intentional without reviewing any words of the defendant." *Commonwealth* v. *Goguen*, App. 38.

[8] Appellant's citations to *Boyce Motor Lines, Inc.* v. *United States* and *Screws* v. *United States* are distinguishable (Brief for Appellant, 18-19). *Boyce* dealt with economic regulation and thus falls within a long-established exception to *Wright* v. *Georgia*, *supra*. In *Screws*, the statutory proscriptions were held to be well-defined. Indeed, the Court asserted that the element of intent "cannot make definite that which is undefined." *Screws* v. *United States*, 325 U.S. 91, 105 (1945).

17, 18, 29) and that this distinguishes appellee's conduct from other acts placing the flag in odd or subordinate positions or otherwise acting contemptuously towards the flag without physically harming it. See, *e.g.*, *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), reversed on other grounds, *sub nom.*, *Hodsdon* v. *Stabler*, 444 F. 2d 533 (3d Cir. 1971). Such a contention is summarily disposed of by pointing out that no reasonable reading of the statute can lead to that conclusion. Indeed, the state court has never so narrowed the statute. Since neither this Court nor the lower federal courts have jurisdiction to authoritatively construe state legislation, the words of the statute must be given their ordinary meaning. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369-370 (1971); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Grayned*, *supra*, at 110.

If this Court were to view the statute as limited to acts against the physical integrity of the flag, then it has been unconstitutionally applied to appellee whose display of the flag was not an act which affects its "physical integrity." Certainly no one would argue that police officers who display flags sewn on their sleeves should be punished under the statute.[9]

> "The present case cannot be compared to the situation where a person who sees thousands of others illegally crossing a street seeks to escape punishment for commission of a similar wrong. In that situation there are well-defined crossing signals, cross-walks and signs which give all persons adequate notice that they are about to commit an offense. Instead we have the totally different situation where those charged with

[9] If it be assumed without evidentiary support that appellee was convicted for sewing the flag to the seat of his pants, the act of sewing cannot be fairly said to affect physical integrity. See *Hoffman* v. *United States*, 445 F. 2d 226 (D.C. Cir. 1971) (concurring opinion of MacKinnon, J.).

violation of the statute before us, after having seen unpunished hundreds, perhaps thousands, of citizens with American flags sewn on various parts of their clothes, or flying in frayed condition from radio antennas of automobiles, or used as advertising in store windows, are expected to know that their similar actions—such as sewing a flag to the seat of one's pants—could constitute contemptuous treatment." *Goguen* v. *Smith*, 471 F. 2d 88, 96.

If, in order to save the statute from vagueness, appellee's crime was not what he did, but the attitude with which he did it, then it is necessarily overbroad in violation of the First Amendment (see Part II below). Alternatively, if the statute speaks to conduct regardless of attitude, then it is necessarily void for vagueness, since there is no way to adequately determine the conduct proscribed.

II. Massachusetts Cannot Utilize Criminal Sanctions to Enforce Respect for the Flag of the United States.

This case is yet another in a series of judicial explorations into the constitutional implications of a 20th Century phenomenon [10] called flag desecration. *E.g., West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Street* v. *New York*, 394 U.S. 576 (1969); *Radich* v. *New York*, 401 U.S. 531 (1971); *Halter* v. *Nebraska*, 205 U.S. 34 (1907); *Long Island Vietnam Moratorium Com-*

[10] Prior to 1896, no state enacted legislation compelling respect or veneration for the American flag. Indeed prior to 1892, no formal Pledge of Allegiance existed in connection with the flag. However, fanned by the patriotic fervor which swept the nation during the Spanish-American War, between 1898-1900, state after state enacted flag legislation requiring school children to pledge allegiance to the flag and imposing criminal sanctions upon individuals who failed to regard the flag with appropriate respect.

mittee v. *Cahn*, 437 F. 2d 344 (2d Cir. 1970), cert. denied 400 U.S. 956 (1970); *Illinois* v. *Sutherland*, 9 Ill. App. 2d 824, 292 N.E. 2d 746 (1973), appeal docketed August 29, 1973; *Spence* v. *Washington*, 81 Wn. 2d 788, 506 P. 2d 293 (1973), appeal docketed June 11, 1973; *Thoms* v. *Heffernan*, 473 F. 2d 478 (2d Cir. 1973), petition for certiorari filed April 9, 1973; See also, *e.g.*, *Parker* v. *Morgan*, 322 F. Supp. 585 W.D N.C. 1971); *Crosson* v. *Silver*, 319 F. Supp. 1084 (D. Ariz. 1970); *Delaware* v. *Hodsdon*, 289 A. 2d 635 (S. Ct. Del. 1972). See generally, Manwaring, *Render Unto Caesar: The Flag Salute Controversy* (University of Chicago Press, 1962); Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 Ariz. L. Rev. 72 (1970); Note, *Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 Mich. L. Rev. 1040 (1968). In each case, the underlying dilemma has been the extent to which a society dedicated to the principle of political toleration may utilize criminal sanctions to compel respect for or veneration of its national symbol. Appellee believes that the First Amendment disables the State from compelling any person to render ritualistic obeisance to an emblem of the State, whether by being ordered to salute it or by being ordered to observe a series of taboos concerning its use or display.

The effect of either form of compulsion is to raise a state trapping to the secular equivalent of a religious icon in violation of the First Amendment.

Our society has, with the unfortunate exception of flag legislation, successfully resisted the pressures to establish a secular religion based upon the deification of the State and its trappings.[11] See generally, Toynbee, *An Historian's*

[11] In enacting statutes imposing criminal sanctions for failure to afford respect to the flag, Massachusetts follows the German experience with its heritage of almost mystical respect for the State. The Kaiser's flag desecration statute provided:

Approach to Religion, 211-219 (Oxford, 1956). Unlike many societies less dedicated to the principle of political tolera-

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"Anyone who maliciously removes, destroys, injures or commits insulting mischief on a public emblem of the authority of the Empire, or of a federal sovereign, or an emblem of the majesty of a federal state, shall be punished by a fine up to 600 Shillings, or by imprisonment with labour up to two years." G. Drage, *Criminal Code of the German Empire*, § 135 (Novella of 1876), at 223 (1885).

In 1932, the German flag desecration statute was amended to provide:

"Whoever publicly profanes the Reich or one of the states incorporated into it, its constitution, colors or flag or the German armed forces, or maliciously and with premeditation exposes them to contempt, shall be punished by imprisonment." (December 19, 1932, RGB 1-I, 548) reproduced in United States War Dept. Pamphlet No. 31-122, *Statutory Criminal Law of Germany*, § 134a, at 95 (August, 1946).

In 1935, Hitler broadened the German statute in the following language:

"Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards and banners, its insignia or decorations or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment." (June 28, 1935) reproduced in United States War Department Pamphlet No. 31-122, *supra*, at 96.

Finally, in 1951, the Federal Republic of Germany enacted the following statute:

"Anybody who publicly . . . (1) defames or maliciously vilifies the Federal Republic of Germany, one of her states, or the constitutional order; or (2) urges or casts disparagement upon their colors, flags, coats-of-arms, or national anthems shall be punished by imprisonment." G. Mueller and T. Buergenthal, *German Penal Code of 1871*, § 86, *Defamation of the State*, at 60 (1961).

Significantly, Great Britain, whose tradition of political toleration parallels our own, has never enacted legislation prohibiting flag desecration.

tion, we have refused to bow to the "cult of personality" or to the spectre of "statism."

It was once the law that a state's asserted interest in enforcing respect for the flag justified compulsory flag veneration. *Minersville School District* v. *Gobitis*, 310 U.S. 586 (1940). However, the notion that the symbolic nature of the flag could form the pretext for the suspension of constitutional freedoms was explicitly rejected three years later in *West Virginia State Board of Education* v. *Barnette, supra,* when this Court overruled *Gobitis* and ruled that compulsory flag salutes violated the First Amendment. Mr. Justice Jackson, writing for this Court in *Barnette,* explicitly rejected the argument that the symbolic nature of the flag conferred upon it a talismanic immunity from the reach of the First Amendment. In words particularly apposite to this appeal, Mr. Justice Jackson wrote:

> "There is no mysticism in the American concept of the State or of the nature or origin of its authority. . . . The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." 319 U.S., at 641.

In *Street* v. *New York, supra,* Mr. Justice Harlan ruled that New York could not punish an individual for contemptuous language directed at an American flag. Drawing heavily upon *Barnette,* Mr. Justice Harlan dismissed the state's interest in insuring proper respect for the mystical integrity of the flag as unworthy of a free society. *Street* v. *New York, supra,* at 593.[12]

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[12] In *Street, supra,* Mr. Justice Harlan enumerated four possible interests served by a flag desecration statute (1) a prohibition upon incitement to unlawful activity; (2) an interest in preventing

Whether one is compelled to respect a flag by saluting it or by observing a series of taboos concerning its use or display, the overriding state interest underlying both forms of compulsion is identical—the maintenance of respect for a symbol of the state. Such an interest has been measured by Mr. Justice Harlan in *Street* and by Mr. Justice Jackson in *Barnette* and has been found wanting. It has no place in a society dedicated to political and religious toleration.

Two hundred years ago, the dominant form of state imposed orthodoxy involved matters of religious belief and practice. Today, heresy is far more likely to be political than religious in nature. Cf. Solzhenitsyn, *One Day in the Life of Ivan Denisovich* (E. P. Dutton, 1963). However, just as the Establishment clause of the First Amendment was designed to act as a barrier against attempts to establish an "official" body of religious dogma, so the Free Speech clause stands as a barrier against well intentioned attempts to establish an official body of patriotic dogma, with our flag as its central totem.

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breaches of the peace caused by hostile reactions to a "contemptuous" use of the flag; (3) an interest in protecting the sensibilities of passers-by who might be offended by "contemptuous" flag usage; and (4) an interest in assuring that citizens maintain proper respect for the flag. *Id.*, at 590-591. As in *Street*, no evidence exists that appellee "incited" any person to unlawful activity, Moreover, no evidence whatever exists that appellee's contemptuous flag usage threatened an imminent breach of the peace. Indeed, the record indicates that appellee's contemptuous flag usage was greeted only by laughter. Finally, Justice Harlan in *Street* properly gave short shrift to the protection of the sensibilities of passers-by when he stated:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.*, at 592.

Massachusetts may no more punish appellee for failing to afford proper respect to the flag than could West Virginia in *Barnette* and New York in *Street*.

The free speech clause of the First Amendment bars attempts to "establish" secular as well as religious orthodoxy.[13] Our flag—as the emblem of a society of free men and women—proclaims the ability of free people to treat it as their conscienes dictate. Those who would punish "contemptuous" treatment paradoxically endanger the very freedom which the flag is designed to represent.

III. Massachusetts General Laws, c. 264, § 5, is Unconstitutionally Overbroad in Violation of the First Amendment.

A. *The Statute is Unconstitutionally Overbroad on its Face.*

The starting point in determining whether a statute is unconstitutionally overbroad in violation of the First Amendment's guarantee of freedom of expression is to determine whether the statute in fact reaches any recognizable expression.[14] We submit that the First Circuit was

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[13] As Mr. Justice Jackson noted in *Barnette:*

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in *politics, nationalism, religion, or other matter of opinion* or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis added.) 319 U.S., at 642.

[14] It is well established that a First Amendment facial overbreadth challenge may be made "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965); *Gooding* v. *Wilson, supra.* Where the statute is "substantially" overbroad its ". . . very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma,* U.S. , 93 S. Ct. 2908, 2916 (1973). The requirement of "substantial" overbreadth is met here

correct in finding that the United States flag is such a powerful symbol that any but purely utilitarian conduct with regard to it is communicative.

> "When more neutral, utilitarian objects such as draft cards are involved in conduct, courts have to decide when such conduct becomes symbolic speech. *O'Brien.* Symbol, semantically, stems from a Greek word meaning 'token' or 'sign,' Webster's Third International Dictionary, Unabridged at 2316. (G & C Merriam Co., Springfield, Mass., 1966.) More specifically, and important for the instant case, a symbol may constitute 'an act, sound or material object having cultural significance and the capacity to excite or objectify a response.' *Id.* Such a primary symbol, likely to be recognized by all who see it, speaks when it is placed in odd positions, conjoined with symbols or words, or made the butt of grimaces, speech, or gestures. We do not have to determine generally at what point that which is often called conduct becomes akin to pure speech. But when the object is a pure symbol, such as the flag in *Halter,* the cross, the Star of David, the crescent, the swastika, the hammer and sickle, the red flag in *Stromberg* v. *California,* 283 U.S. 359 (1931), or black armband in *Tinker,* any individualized activity with regard to it outside of the purely logistical activity of maintaining or storing of it is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.' " *Goguen* v. *Smith,* 471 F. 2d, at 99.

Appellant appears to argue that the flag's meaning is so diverse and diffuse that it is impossible to conclude that

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since the statute cuts a broad swath through protected areas and continuous impermissible application is assured by the nature of the proscription, *i.e.,* treatment of the flag evincing a contemptuous attitude.

the flag is always "saying something" (Brief for Appellant, 23-25), although even his supportive citation concedes that the flag "[a]lways . . . represents America in all its marvelous diversity." *Parker* v. *Morgan*, 322 F. Supp. 585, 588 (W.D. N.C. 1971). The better view of the flag's meaning is that which appears in *Halter* v. *Nebraska:*

> "[T]he flag [has been] the symbol of the Nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." 205 U.S. 34, 43 (1907).

and in *Joyce* v. *United States:*

> "Throughout our history as a nation the flag has been our symbol in many ways, foreign and domestic. . . . It has signified our national presence on battleships, airplanes, school houses and army forts. . . . Wherever it flies it signifies the presence of the United States of America." 454 F. 2d 971, 975-976 (D.C. Cir. 1971).

Accordingly, it is indeed "self-evident that most, if not all, conduct associated with the flag is symbolic speech." *Crosson* v. *Silver*, 319 F. Supp. 1084, 1086 (D. Ariz. 1970). Accord, *Hodsdon* v. *Buckson, supra.* See also *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F. 2d 344 (2d Cir. 1970), *Hoffman* v. *United States*, 445 F. 2d 226 (D.C. Cir. 1971).

Even if the flag's symbolic meaning is too undifferentiated to be defined for First Amendment purposes, the

statute still is directed at the suppression of expression. Appellant himself urges upon this Court that appellee was convicted for his contemptuous state of mind (Brief for Appellant, 18). In oral argument before the First Circuit, appellant admitted that if two persons did exactly the same thing with respect to the flag, only the one with a contemptuous state of mind would be prosecuted. *Goguen* v. *Smith*, 471 F. 2d., at 102. The statute, therefore, violates the First Amendment by punishing, not conduct, but attitude. In *West Virginia State Board of Education* v. *Barnette, supra,* this court held that the First Amendment barred government from forcing citizens to demonstrate their fealty to whatever it considered "orthodox in politics, nationalism, religion, or other matters of opinion." *Id.*, at 642. While that case dealt with a state's attempt to force a showing of respect and this case concerns an attempt to prevent a showing of contempt, the principle of First Amendment protection remains constant. Indeed, this court has expressly held that a state may not prevent the public expression of contempt for the flag.

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinion about our flag, *including those opinions which are defiant or contemptuous.*" *Street* v. *New York, supra,* at 593. (Emphasis added.)

Although the statute here, unlike the statute in *Street,* does not make explicit reference to "words," the language plainly encompasses pure speech as well as symbolic expression.

"This is not a case like *Street* where a federal court could, by excising but a few words, draw precise lines with constitutional certainty so as to eliminate the interpretation or provision of the statute under which the defendant was convicted. Such per se rules of First Amendment privilege, Note, *The First Amendment Overbreadth Doctrine, supra* at 882-910, were appropriate there because the Court felt that the defendant in *Street* might have been convicted of casting contempt, 'by words,' and it could easily excise those those words from the statute, thereby reversing that defendant's conviction. The case before us is quite different in that by deleting the phrase 'treats contemptuously' from Mass. Gen. Laws ch. 264, § 5, we would completely frustrate and subvert the Commonwealth's intention as evidenced by those terms. Clearly, as the Commonwealth stated at argument, it does not wish to punish all acts of the flag, but only contemptuous ones. Yet to alter the face of this statute, leaving it to read 'Whoever publicly mutilates, tramples upon, [or] defaces . . . the flag' would be legislating for the state, because the element of contempt common to every offense under this statute would be removed." *Goguen* v. *Smith*, 471 F. 2d, at 104.

If the statute is not found unconstitutionally overbroad as a regulation of pure speech, it nevertheless must fall as an overbroad regulation of symbolic speech.

It is conceded that a state may curtain symbolic expression, but only as it is necessary to further a substantial governmental interest. In *United States* v. *O'Brien*, 391 U.S. 367 (1968), this Court used a four-part analysis to determine when government can regulate conduct containing "speech" and "non-speech" elements. The Court took

judicial notice of the symbolic speech element of burning a draft card but concluded that the government had a legitimate interest in requiring the preservation of draft cards in furtherance of its power to raise and support armies and to insure the efficient functioning of the Selective Service System.

According to *O'Brien*, in order for a government regulation of "symbolic speech" to be constitutionally justified it must (a) be within the constitutional powers of the government; (b) further an important or substantial government interest; (c) the government interest must be unrelated to the suppression of free speech; and (d) any incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of a legitimate governmental interest. *O'Brien*, p. 377.

Assuming a substantial governmental interest might be to protect against a breach of peace, that interest may be furthered only by narrowly-drawn statutes aimed at specifically inflammatory conduct. *Gooding* v. *Wilson*, *supra*. In *Street* v. *New York*, *supra*, this court concluded that protecting against a breach of the peace could not constitutionally justify conviction of Street for his use of contemptuous words directed against the United States flag.

There is no rational distinction between the use of opprobrious words toward the flag and the conduct of appellee. The fatal flaw of the statute is that it does not attempt to limit itself to those acts and words which might incite others to unlawful conduct or to a breach of the peace, but sweepingly proscribes all words or acts, however innocuous, which show contempt for our flag. An individual could be prosecuted under G.L. c. 264, § 5, for sticking his tongue out at the flag or for revealing his distaste for the flag by any passive expression of opinion. See *Tinker* v. *DesMoines*

Independent Community School District, 393 U.S. 503 (1969). The present case is therefore distinguishable from that in which the legislature has narrowly drawn a proscription against conduct within the legislative competence. See *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

It is also well settled that expression may not be prohibited merely because it offends the sensibilities of those who may observe or listen, *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Street* v. *New York, supra,* even though such expression concerns the United States flag. *Barnette, supra; Street, supra.* Compare *Halter* v. *Nebraska,* 205 U.S. 34 (1907).

Most recently this Court has held that the public use of a particularly offensive "vulgar allusion" could not be constitutionally punished. *Cohen* v. *California,* 403 U.S. 15 (1971). The Court was of the opinion that despite the objectionable and offensive nature of Cohen's expression, it was permissible speech in a public forum:

> ". . . [In] arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, *e.g., Organization for a Better Austin* v. *Keefe,* 401 U.S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g., Rowan* v. *Post Office Dept.,* 397 U.S. 728

(1970), we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' *Id.*, at 738." *Cohen, supra*, at 21.

As in *Street*, the court in *Cohen* also considered and rejected an argument that the communication might incite violent retaliation.[15]

The Court reiterated that such a rationale must be based upon a probability of violence rather than an "undifferentiated fear or apprehension of disturbance."

> "The rationale of the California court is plainly untenable. At most it reflects an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' *Tinker* v. *Des Moines Indep. Community School Dist., supra* at 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force

[15] This breach of peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence. The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow settlers at 'Fruitlands,' not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up. A man does not become a criminal because some one else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence." Chaffee, *Free Speech in the United States*, pp. 151-152 (1942).

> persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves." *Cohen, supra,* at 23.

The statute cannot therefore be justified as preservative of the public peace.[16] *Hodsdon* v. *Buckson, supra,* at 536; *Crosson* v. *Silver, supra,* at 1089.

The language and purpose of the statute seek to prevent the public expression of a "contemptuous" attitude toward the flag.[17] Thus the statute is a direct attack upon freedom of expression expressly prohibited under the third *O'Brien* test. Furthermore, the statute contains no safeguards against the impairment of freedom of expression by limiting itself to the circumstances attendant upon the expression. Instead it censures content. *Cohen, supra.*

Finally, appellant asserts that the state has an interest in preserving the physical integrity of the flag as a "symbol of unity on national ideas or purposes." (Brief for Appellant, 24).[18] See *Goguen* v. *Smith,* 343 F. Supp. 161 (D. Mass. 1972). While several courts have considered this to be a proper state interest (see *Hoffman* v. *United States, supra; Joyce* v. *United States, supra; Goguen* v. *Smith,* 343 F. Supp. 161 (D. Mass. 1972). See also *Street* v. *New York,*

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[16] As applied here, of course, rather than a threatened breach of the peace, the evidence shows that persons present were amused (App. 3).

[17] Witness the appellant's contentions in oral argument before the First Circuit, *Goguen* v. *Smith,* 471 F. 2d, at 102.

[18] We disagree. See Part II, *supra.*

supra, dissenting opinions), this Court has held that such is not a legitimate state interest as to "pure speech." *Street, supra*. There is no rational way to distinguish the words in *Street* from the passive conduct proscribed here.

> "While it may be that disrespect for the flag can constitute grounds for non-criminal sanctions, we think that promotion of loyalty and patriotism may not constitutionally furnish a justification for imposition of criminal penalties. If verbal abuse of the flag cannot be proscribed in an effort to encourage respect for our national symbol, then we fail to understand how physical abuse which is visually communicative, the archetype situation which the Massachusetts statute reaches, can similarly be forbidden on these nationalistic grounds." *Goguen* v. *Smith*, 471 F. 2d, at 101.

Assuming a legitimate state interest can be found in promoting patriotism, this statute is incapable of a constitutionally adequate narrowing construction. Indeed, rather than being unrelated to the suppression of free expression, this hypothetical governmental interest necessarily restricts it. This Court's analysis in *Schacht* v. *United States*, 398 U.S. 58 (1970), is particularly apposite here. Schacht was convicted of violating a federal statute allowing the wearing of an Army uniform off-duty only in theatrical productions which did not "tend to discredit" the Army. The government attempted to justify the proscription as reaching only non-expressional conduct allegedly unprotected by the First Amendment. The argument was disposed of by Mr. Justice Harlan when he stated that Schacht's conviction:

> "can be sustained only if he can be punished for speaking out against the role of the Army and our coun-

> try in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgement of freedom of speech. The final clause of [this statute] which leaves Americans free to praise the war in Vietnam but can send persons like [the defendant] to prison for opposing it, cannot survive in a country which has the First Amendment." *Schacht, supra,* at 63.

Like the statute in *Schacht,* this statute, ". . . to the extent that it evidenced a state interest in promoting nationalism, is directly related to the suppression of free expression" *Goguen* v. *Smith,* 471 F. 2d at 103. The restraint on free expression is not incidental to the furtherance of the governmental interest but instead is the very essence if it. The statute thus fails the third and fourth tests of *O'Brien.*

B. *The Statute is Unconstitutionally Overbroad as Applied to Appellee.*

1. Appellee's conduct was a form of expression entitled to First Amendment protection.

While perhaps having "nonspeech elements" (*O'Brien, supra,* at 376), appellee's activity is primarily a form of "silent, passive expression of opinion" (*Tinker, supra*) concerning the American flag and that which it represents. Viewed in this light, appellee's activity should be treated as "closely akin to 'pure speech' because of the 'political or controversial significance' of the symbol" involved. *Goguen* v. *Smith,* 471 F. 2d 88, 100, fn. 18; *Tinker, supra; Cohen* v. *California, supra.* See also *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969). What appellee did with respect to the flag is predominantly communicative and is indistinguishable from displaying the American flag below the flag of the United Nations (*Hodsdon* v. *Buckson,*

supra), displaying a red flag (*Stromberg* v. *California*, 283 U.S. 359 (1931), or wearing a shirt or vest made from an American flag (*Hoffman* v. *United States, supra; Cowgill* v. *California*, 396 U.S. 371 (1970)).[19]

Even if appellee's activity is not considered the equivalent of "pure speech," his particular use of the American flag was the communication of an attitude or idea through the use of a controversial symbol. Indeed, it was necessary for the jury to find that appellee conveyed a contemptuous attitude in order to convict him. He engaged then in symbolic expression, "the communicative content [of which] was beyond dispute." *Goguen* v. *Smith*, 471 F. 2d at 99. As previously discussed, the American flag has such powerful symbolic meaning, in and of itself, that "any individualized activity with regard to it . . . is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.' " *Id.* The combination of the use of the flag, a "primary," "pure" symbol, and its display on the seat of his pants constitutes the mode of appellee's expression: the medium was the message.

The message is concededly imprecise.[20] However, precise expression is not a prerequisite of First Amendment expression. *Crosson* v. *Silver*. 319 F. Supp. 1084 (D. Arizona 1970); *Thoms* v. *Smith*, 334 F. Supp. 1203 (D. Conn. 1971); *Hodsdon, supra.* In the area of symbolic speech, precise

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[19] *Cowgill's* reference to a lack of communicative content is inapplicable here since the public display of a contemptuous attitude was not essential to Cowgill's conviction.

[20] The record is of some assistance. It reflects that persons nearby were laughing while appellee was being questioned about the flag by a policeman (App. 9). If the laughter was responsive, even in part, to the flag display (*i.e.*, not directed solely to the conversation), then it is evidence of an attitude toward the flag successfully conveyed to an apparently sympathetic audience. In any case, the laughter dispels any claim that an apparent or potential breach of the peace was imminent.

meaning is rarely discernible. Where a symbol is primary, like the American flag, it is hardly possible to postulate exact verbal meaning even where, as here, the conduct and the factual setting reflects an unambiguous intent to communicate. Compare *O'Brien, Hoffman* and *Joyce, supra.* In short, communicative value does not depend on whether the idea sought to be expressed can be verbalized. A flag on the seat of the pants is an idea *per se.*

> "Although the message may often seem somewhat 'inarticulate,' as it did to the Massachusetts Supreme Court and, we add, capable of various interpretations, ranging from misdirected humor to political criticism, revulsion at society's values, and rejection of any national fealty, we think it clear that communication is the process being engaged in . . . ." *Goguen* v. *Smith* 471 F. 2d, at 99-100.

2. No state interest in support of the statute justifies its application to appellee.

Only three possible legitimate state interests in support of the statute can be postulated: (1) protection against breaches of the peace, (2) protecting the physical integrity of the flag, and (3) preserving the flag as a symbol of unity on national ideals and purpose. None of these interests justifies penalizing appellee's expression under *O'Brien.*

There is no showing of any imminent or threatened breach of the peace, nor did appellee affect the physical integrity of the flag.

We concede that appellee's mode of expression may have contravened a hypothetical state interest in promoting patriotism, *vel non.* However, this Court has held that expressions of defiant or contemptuous attitudes toward the flag are protected by the First Amendment. *Street* v. *New York, supra.*

Conclusion.

For the foregoing reasons, the judgment below should be affirmed.

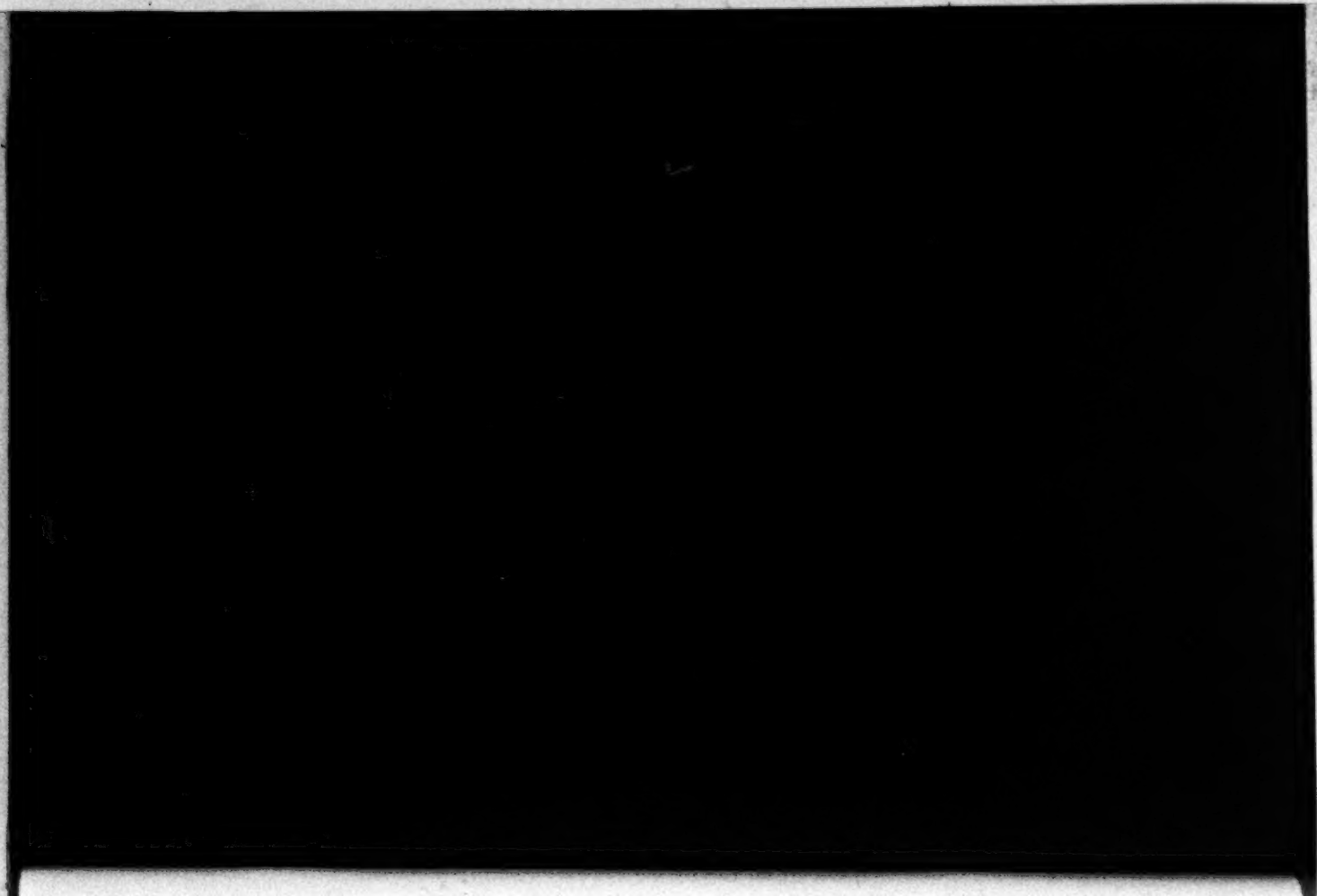
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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1254

JOSEPH SMITH, SHERIFF OF
WORCESTER COUNTY,
APPELLANT,

v.

VALARIE GOGUEN,
APPELLEE.

REPLY BRIEF FOR APPELLANT

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APPELLEE.

REPLY BRIEF FOR APPELLANT

Argument

I. THE ISSUE OF EXHAUSTION OF STATE REMEDIES IS PROPERLY BEFORE THIS COURT.

Appellee argues to this Court that appellant has waived any right appellant had to rely upon the doctrine of exhaustion of state remedies as codified in 28 U.S.C.

2254(b). He argues that since appellant "admitted in his return that appellee had properly exhausted . . . state remedies," appellant "cannot raise [exhaustion] on appeal for the first time in this Court." (Brief for Appellee, 4). This is not accurate.

Appellant, in his return, stated that he admitted the allegations contained in the following sentence of the habeas corpus petition, to wit:

> "The petitioner has satisfied the requirements of 28 U.S.C. §2254 by prosecuting an appeal on exception to the Supreme Judicial Court of Massachusetts wherein the petitioner *assigned as error* the deprivation of constitutional rights herein complained of." (Emphasis supplied) (App. 43).

A reading of appellee's Amended Bill of Exceptions (App. 1) filed in the Supreme Judicial Court of Massachusetts would lead one to believe that appellee had fully presented the vagueness issue to the highest state court. But this "assignment of error" was never argued to the Supreme Judicial Court — nor, for that matter, was it argued to the federal district court.

The issue of whether appellee had exhausted his state remedies on the facial vagueness of the Massachusetts statute did not become evident until the First Circuit Court delivered its opinion. That opinion rightly noted that the "concepts of vagueness and overbreadth are fraternal, not identical twins, having affinity but separate identities and purposes . . . ." (Jur. St. 23). The Court made this distinction despite the rather garbled briefs of the appellant and appellee which briefs argued, essentially, First Amendment overbreadth. However, once the First Circuit spoke of whether the flag statute gave fair notice

on its face of what conduct the statute proscribed, it became clear that the substance of this argument had never been presented to the Supreme Judicial Court.

Of course, the appellant never intended to waive the issue of exhaustion of state remedies and was well aware that, at least in the First Circuit, "[t]he doctrine of exhaustion . . . is not a matter for waiver by counsel." *Needel* v. *Scafati*, 412 F.2d 761, 766, *cert. den.* 396 U.S. 861 (1969). To insure that this case was presented to the federal courts in the same manner that it came before the Supreme Judicial Court, appellant made certain that the state court briefs were included in the record that was submitted to the federal district court (App. 46). Because the Supreme Judicial Court had issued a rescript opinion, a submission of the state court briefs was doubly necessary in this case. The briefs enabled one to place the conclusions found in the short opinion into a workable context.[1] It was assumed that the Amended Bill of Exceptions, the state court briefs and the Supreme Judicial Court opinion would act as an effective guide in delineating the precise constitutional questions that were before the federal district court.

II. The Substance of a Facial Vagueness Claim Was Never Made to the Supreme Judicial Court.

Appellee tells us at page eight of his brief that "[t]he essence of a claim that a statute is vague is that it is a violation of the Fourteenth Amendment's guarantee of due process of law to impose criminal penalties under a statute which does not give adequate notice of the pro-

[1] The "workable context" was intended not only for the federal court but also for the Commonwealth's Attorney General Office which Office became counsel for appellant once the federal habeas corpus petition was filed.

scribed conduct." However, as can be seen from a search of appellee's brief in the Supreme Judicial Court (App. 8-28), the "essence" of the vagueness issue was never presented to the Commonwealth's highest court. Nor were any of the "trappings" of a Fourteenth Amendment vagueness argument made in the state court.

A close study of the state court brief shows that neither a "facial" nor an "as applied" vagueness argument was made. Accordingly, it would have been permissible for the Supreme Judicial Court to decide the case solely on the basis of overbreadth considerations rather than finding "no vagueness in the statute as applied here." (App. 37). However, the state court having made the above finding, the issue of "vagueness as applied" was properly before the federal courts.

In *Picard* v. *Connor*, 404 U.S. 270 (1971) this Court held (at 278) "that the substance of a federal habeas corpus claim must first be presented to the state courts." Appellee[2] has failed to meet that standard in this case. See *United States ex rel. Nelson* v. *Zelker*, 465 F.2d 1121, 1123-25 (2nd Cir.), *cert. den.* 409 U.S. 1045 (1972); *Ferguson* v. *Cox*, 464 F.2d 461 (4th Cir. 1972); *United States ex rel. Blyden* v. *Singerman*, 350 F. Supp. 246 (S.D.N.Y. 1972).

III. Appellee's Reliance on a Supposed Admission of Appellant at Oral Argument Before the First Circuit Court Is Misplaced.

Appellee makes much of a statement in the First Circuit Court opinion to the effect that appellant admitted that two people could use the flag in the same manner with the

[2] Appellee has been represented by experienced, competent counsel at all stages of his case. Admittedly, a somewhat lessened standard might apply for "pro se" petitioners.

result that one would be prosecuted while the other would not. (Brief for Appellee, 9, 20, 25 n. 17). 471 F.2d at 102, Jur. St. 44. Appellee's reliance on this statement is unfortunate because appellant made no such admission.

At oral argument the First Circuit posed a hypothetical to the effect that two people, one a war veteran, the other a war protester, used the flag as a head covering to avoid getting wet as they left their respective rallies. Would both or either be prosecuted under the Massachusetts statute? Appellant answered that on the sole facts presented in the hypothetical neither would be prosecuted. The statute is not directed at inadvertent acts. Intent has to be proven to establish a violation of the statute. Where the conduct involved is egregious (e.g. trampling upon a flag) intent is readily inferable from the act itself. However, the more ambiguous the conduct involving the flag becomes, the more important become other elements that evidence intent. Eventually a point is reached where no matter how obvious a person's contempt for the flag might be, the specific flag conduct engaged in is not proscribed by the statute. For example, a person could hold up a flag and speak all manner of vile and defiant opinions about it. Absent conduct that touches the physical integrity of the flag he has not violated the Massachusetts statute.

Such a situation is not presented by the instant case.

Conclusion

For the reasons stated in his brief and in this reply brief, appellant respectfully requests this Court to reverse the judgment of the court below.

Dated: Boston, Massachusetts, November 5, 1973.

Respectfully submitted,

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SMITH, SHERIFF *v.* GOGUEN

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72-1254. Argued November 12-13, 1973—Decided March 25, 1974

Appellee, for wearing a small United States flag sewn to the seat of his trousers, was convicted of violating the provision of the Massachusetts flag-misuse statute that subjects to criminal liability anyone who "publicly . . . treats contemptuously the flag of the United States . . . ." The Massachusetts Supreme Judicial Court affirmed. The District Court in appellee's habeas corpus action found the "treats contemptuously" phrase of the statute unconstitutionally vague and overbroad. The Court of Appeals affirmed. *Held:*

1. The challenged statutory language, which had received no narrowing state court interpretation, is void for vagueness under the Due Process Clause of the Fourteenth Amendment, since by failing to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that are criminal and those that are not it does not provide adequate warning of forbidden conduct and sets forth a standard so indefinite that police, court, and jury are free to react to nothing more than their own preferences for treatment of the flag. Pp. 572-576, 578.

2. By challenging in state courts the vagueness of the "treats contemptuously" phrase as applied to him, appellee preserved his due process claim for purposes of federal habeas corpus jurisdiction, *Picard* v. *Connor*, 404 U. S. 270, since the challenged language is void for vagueness as applied to appellee or to anyone else. A "hard-core" violator concept has little meaning with regard to the challenged language, because the phrase at issue is vague not in the sense of requiring a person to conform his conduct to an imprecise but comprehensible standard, but in the sense of not specifying any ascertainable standard of conduct at all. Pp. 576-578.

3. Even if, as appellant contends, the statute could be said to deal only with "actual" flags of the United States, this would not resolve the central vagueness deficiency of failing to define contemptuous treatment. Pp. 578-579.

4. That other words of the desecration and contempt portion of the statute address more specific conduct (mutilation, trampling, and defacing of the flag) does not assist appellant, since appellee was tried solely under the "treats contemptuously" phrase, and the highest state court in this case did not construe the challenged phrase as taking color from more specific accompanying language. Pp. 579–580.

5. Regardless of whether restriction by that court of the scope of the challenged phrase to intentional contempt may be held against appellee, such an interpretation nevertheless does not clarify what conduct constitutes contempt of the flag, whether intentional or inadvertent. P. 580.

471 F. 2d 88, affirmed.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 583. BLACKMUN, J., *post*, p. 590, and REHNQUIST, J., *post*, p. 591, filed dissenting opinions, in which BURGER, C. J., joined.

Charles E. Chase, Assistant Attorney General of Massachusetts, argued the cause for appellant. With him on the briefs were *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, and *David A. Mills*, Assistant Attorneys General, and *William T. Buckley*.

Evan T. Lawson argued the cause for appellee. With him on the brief were *Matthew Feinberg* and *Burt Neuborne*.

MR. JUSTICE POWELL delivered the opinion of the Court.

The sheriff of Worcester County, Massachusetts, appeals from a judgment of the United States Court of Appeals for the First Circuit holding the contempt provision of the Massachusetts flag-misuse statute unconstitutionally vague and overbroad. 471 F. 2d 88 (1972), aff'g 343 F. Supp. 161 (Mass). We noted probable jurisdiction. 412 U. S. 905 (1973). We affirm on the vague-

ness ground. We do not reach the correctness of the holding below on overbreadth or other First Amendment grounds.

I

The slender record in this case reveals little more than that Goguen wore a small cloth version of the United States flag sewn to the seat of his trousers.[1] The flag was approximately four by six inches and was displayed to the left rear of Goguen's blue jeans. On January 30, 1970, two police officers in Leominster, Massachusetts, saw Goguen bedecked in that fashion. The first officer encountered Goguen standing and talking with a group of persons on a public street. The group apparently was not engaged in any demonstration or other protest associated with Goguen's apparel.[2] No disruption of traffic or breach of the peace occurred. When this officer approached Goguen to question him about the flag, the other persons present laughed. Some time later, the second officer observed Goguen in the same attire walking in the downtown business district of Leominster.

The following day the first officer swore out a complaint against Goguen under the contempt provision of the Massachusetts flag-misuse statute. The relevant part of the statute then read:

> "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the

[1] The record consists solely of the amended bill of exceptions Goguen filed in the Massachusetts Supreme Judicial Court, the opposing briefs before that court, the complaint under which Goguen was prosecuted, and Goguen's federal habeas corpus petition. App. 1–36, 42–43. We do not have a trial transcript, although Goguen's amended bill of exceptions briefly summarizes some of the testimony given by witnesses for the prosecution at his state trial. Goguen did not take the stand. Thus we do not have of record his account of what transpired at the time of his arrest or of his purpose in wearing a flag on the seat of his trousers.

[2] Tr. of Oral Arg. 5–6, 35–36.

United States . . . , whether such flag is public or private property . . . , shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. . . ."[3]

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[3] Mass. Gen. Laws Ann., c. 264, § 5. Omitting several sentences protecting the ceremonial activities of certain veterans' groups, the statute read as follows at the time of Goguen's arrest and conviction:

"§ 5. Flag; penalty for misuse

"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States or of Massachusetts, whether such flag is public or private property, or whoever displays such flag or any representation thereof upon which are words, figures, advertisements or designs, or whoever causes or permits such flag to be used in a parade as a receptacle for depositing or collecting money or any other article or thing, or whoever exposes to public view, manufactures, sells, exposes for sale, gives away or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise or a receptacle of merchandise or articles upon which is attached, through a wrapping or otherwise, engraved or printed in any manner, a representation of the United States flag, or whoever uses any representation of the arms or the great seal of the commonwealth for any advertising or commercial purpose, shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both. Words, figures, advertisements or designs attached to, or directly or indirectly connected with, such flag or any representation thereof in such manner that such flag or its representation is used to attract attention to or advertise such words, figures, advertisements or designs, shall for the purposes of this section be deemed to be upon such flag."

The statute is an amalgam of provisions dealing with flag desecration and contempt (the first 26 words) and with commercial misuse or other exploitation of flags of the state and national government. This case concerns only the "treats contemptuously" phrase of the statute, which has apparently been in the statute since its enactment in 1899. 471 F. 2d 88, 90 n. 2 (1972).

In 1971, subsequent to Goguen's prosecution, the desecration and contempt portion of the statute was amended twice. On March 8,

Despite the first six words of the statute, Goguen was not charged with any act of physical desecration.[4] As permitted by the disjunctive structure of the portion of the statute dealing with desecration and contempt, the officer charged specifically and only that Goguen "did publicly treat contemptuously the flag of the United States . . . ".[5]

After jury trial in the Worcester County Superior Court, Goguen was found guilty. The court imposed a sentence of six months in the Massachusetts House of Corrections. Goguen appealed to the Massachusetts Supreme Judicial Court, which affirmed. *Commonwealth* v. *Goguen*, — Mass. —, 279 N. E. 2d 666 (1972). That court rejected Goguen's vagueness argument with the comment that "[w]hatever the uncertainties in other circumstances, we see no vagueness in the statute as applied here." *Id.*, at —, 279 N. E. 2d, at 667. The court cited no Massachusetts precedents

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1971, the legislature, per Stats. 1971, c. 74, modified the first sentence by inserting "burns or otherwise" between the terms "publicly" and "mutilates," and, in addition, by increasing the fine. Mass. Gen. Laws Ann., c. 264, § 5 (Supp. 1973). On August 12, 1971, via Stats. 1971, c. 655, the legislature appended a new sentence defining "the flag of the United States" phrase appearing in the first sentence: "For the purposes of this section the term 'flag of the United States' shall mean any flag which has been designated by Act or Resolution of the Congress of the United States as the national emblem, whether or not such designation is currently in force." *Ibid.* The 1971 amendments are relevant to this case only in the tangential sense that they indicate a recognition by the legislature of the need to tighten up this imprecise statute.

[4] Perhaps this was because of the difficulty of the question whether Goguen's conduct constituted physical desecration of the flag. Cf. 471 F. 2d, at 91 n. 4 ("[W]e are not so sure that sewing a flag to a background clearly affects 'physical integrity'").

[5] App. 4.

interpreting the "treats contemptuously" phrase of the statute.[6]

After Goguen began serving his sentence, he was granted bail and then ordered released on a writ of habeas corpus by the United States District Court for the District of Massachusetts. 343 F. Supp. 161. The District Court found the flag-contempt portion of the Massachusetts statute impermissibly vague under the Due Process Clause of the Fourteenth Amendment as well as overbroad under the First Amendment. In upholding Goguen's void-for-vagueness contentions, the court concluded that the words "treats contemptuously" did not provide a "readily ascertainable standard of guilt." *Id.*, at 167. Especially in "these days when flags are commonly displayed on hats, garments and vehicles . . . ," the words under which Goguen was convicted "leave conjectural, in many instances, what conduct may subject the actor to criminal prosecution." *Ibid.* The court also found that the statutory language at issue "may be said to encourage arbitrary and erratic arrests and convictions." *Ibid.*

The Court of Appeals, with one judge concurring, affirmed the District Court on both First Amendment and vagueness grounds. 471 F. 2d 88. With regard to the latter ground, the Court of Appeals concluded that "resolution of [Goguen's void-for-vagueness] challenge to the statute as applied to him necessarily adjudicates the statute's facial constitutionality . . . ." *Id.*, at 94. Treat-

[6] Appellant correctly conceded at oral argument that Goguen's case is the first recorded Massachusetts court reading of this language. Tr. of Oral Arg. 17–18. Indeed, with the exception of one case at the turn of the century involving one of the statute's commercial-misuse provisions, *Commonwealth* v. *R. I. Sherman Mfg. Co.*, 189 Mass. 76, 75 N. E. 71 (1905), the entire statute has been essentially devoid of state court interpretation.

ing as-applied and on-the-face vagueness attacks as essentially indistinguishable in light of the imprecision of the statutory phrase at issue, *id.*, at 92, 94, the court found that the language failed to provide adequate warning to anyone, contained insufficient guidelines for law enforcement officials, and set juries and courts at large. *Id.*, at 94–96. Senior Circuit Judge Hamley, sitting by designation from the Ninth Circuit, concurred solely in the void-for-vagueness holding. *Id.*, at 105. Judge Hamley saw no need to reach the "far broader constitutional ground" of First Amendment overbreadth relied on by the majority, noting the "settled principle of appellate adjudication that constitutional questions are not to be dealt with unless this is necessary to dispose of the appeal." *Ibid.*

II

We agree with the holdings of the District Court and the Court of Appeals on the due process doctrine of vagueness. The settled principles of that doctrine require no extensive restatement here.[7] The doctrine incorporates notions of fair notice or warning.[8] Moreover, it requires

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[7] The elements of the void-for-vagueness doctrine have been developed in a large body of precedent from this Court. The cases are categorized in, *e. g.*, *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

[8] *E. g.*, *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162 (1972); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids") (citations omitted); *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law") (citations omitted).

legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." [9] Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.[10] The statutory language at issue here, "publicly . . . treats contemptuously the flag of the United States . . . ," has such scope, *e. g., Street* v. *New York*, 394 U. S. 576 (1969) (verbal flag contempt), and at the relevant time was without the benefit of judicial clarification.[11]

Flag contempt statutes have been characterized as void for lack of notice on the theory that "[w]hat is contemptuous to one man may be a work of art to another." [12] Goguen's behavior can hardly be described as art. Immaturity or "silly conduct" [13] probably comes closer to the mark. But we see the force of the District Court's observation that the flag has become

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[9] *E. g., Grayned, supra,* at 108; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89 (1921) ("[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury"); *United States* v. *Reese*, 92 U. S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large").

[10] *E. g., Grayned, supra,* at 109; *Smith* v. *California*, 361 U. S. 147, 151 (1959). Compare the less stringent requirements of the modern vagueness cases dealing with purely economic regulation. *E. g., United States* v. *National Dairy Products Corp.*, 372 U. S. 29 (1963) (Robinson-Patman Act).

[11] See n. 6, *supra.*

[12] Note, 66 Mich. L. Rev. 1040, 1056 (1968).

[13] 343 F. Supp. 161, 166.

testor who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion who, caught in the same rainstorm while returning from an 'America—Love It or Leave It' rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude, would *not* be prosecuted." 471 F. 2d, at 102 (emphasis in original).

Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.

III

Appellant's arguments that the "treats contemptuously" phrase is not impermissibly vague, or at least should not be so held in this case, are unpersuasive. Appellant devotes a substantial portion of his opening brief, as he did his oral argument, to the contention that Goguen failed to preserve his present void-for-vagueness claim for the purposes of federal habeas corpus jurisdiction. Appellant concedes that the issue of "vagueness as applied" is properly before the federal courts,[18] but contends that Goguen's only arguable claim is that the statute is vague on its face. The latter claim, appellant insists, was not presented to the state courts with the requisite fair precision. *Picard* v. *Connor*, 404 U. S. 270 (1971). This exhaustion-of-remedies argument is belatedly raised,[19] and it fails to take the full measure of

[18] Reply Brief for Appellant 4.

[19] Goguen filed his federal habeas corpus petition subsequent to *Picard* v. *Connor*, 404 U. S. 270 (1971). Yet it appears that appellant did not raise his present exhaustion-of-remedies argument before the District Court. That court commented specifically on this

Goguen's efforts to mount a vagueness attack in the state courts.[20] We do not deal with the point at length, however, for we find the relevant statutory language impermissibly vague as applied to Goguen. Without doubt the "substance" of this claim was "fairly presented" to the state courts under the exhaustion standards of *Picard, supra*, at 275, 278.

Appellant's exhaustion-of-remedies argument is premised on the notion that Goguen's behavior rendered him a hard-core violator as to whom the statute was not vague, whatever its implications for those engaged in different conduct. To be sure, there are statutes that

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omission: "No contention is now made that [Goguen] has not exhausted state remedies, nor that the constitutional issues presented here were not raised appropriately in state proceedings." 343 F. Supp., at 164.

[20] Goguen filed in state superior court an unsuccessful motion to dismiss the complaint in which he cited the Fourteenth Amendment and alleged that the statute under which he was charged was "impermissibly vague and incapable of fair and reasonable interpretation by public officials." App. 1. This motion was also before the Massachusetts Supreme Judicial Court, since it was incorporated in Goguen's amended bill of exceptions. *Ibid.* In addition, Goguen's brief before that court raised vagueness points and cited vagueness cases. *Id.*, at 19, 26–27, citing *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939), and *Parker* v. *Morgan*, 322 F. Supp. 585 (WDNC 1971) (three-judge court) (North Carolina flag contempt statute void for vagueness and overbreadth). Appellant is correct in asserting that Goguen failed to compartmentalize in his state court brief the due process doctrine of vagueness and First Amendment concepts of overbreadth. See App. 19–24. But permitting a degree of leakage between those particular adjoining compartments is understandable. Cf. Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 871–875 (1970). The highest state court's opinion, which dealt separately with Goguen's First Amendment and vagueness claims, *Commonwealth* v. *Goguen*, — Mass. —, —, 279 N. E. 2d 666, 667 (1972), indicates that that court was well aware that Goguen raised both sets of arguments.

by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept makes some sense with regard to such statutes. The present statute, however, is not in that category. This criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971). Such a provision simply has *no* core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language. In our opinion the defect exists in this case. The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag.

Turning from the exhaustion point to the merits of the vagueness question presented, appellant argues that any notice difficulties are ameliorated by the narrow subject matter of the statute, "actual" flags of the United States.[21] Appellant contends that this "takes some of the vagueness away from the phrase, 'treats contemptuously . . . .'"[22] Anyone who "wants notice as to what conduct this statute proscribes . . . , immediately knows that it has something to do with flags and if he wants to

[21] Brief for Appellant 17; Tr. of Oral Arg. 9.

[22] *Ibid.*

stay clear of violating this statute, he just has to stay clear of doing something to the United States flag." [23] Apart from the ambiguities presented by the concept of an "actual" flag,[24] we fail to see how this alleged particularity resolves the central vagueness question—the absence of any standard for defining contemptuous treatment.

Appellant's remaining arguments are equally unavailing. It is asserted that the first six words of the statute add specificity to the "treats contemptuously" phrase, and that the Massachusetts Supreme Judicial Court customarily construes general language to take on color from more specific accompanying language. But it is conceded that Goguen was convicted under the general phrase alone, and that the highest state court did not rely on any general-to-specific principle of statutory

[23] *Ibid.*

[24] At the time of Goguen's prosecution, the statute referred simply to "the flag of the United States . . . ," without further definition. That raises the obvious question whether Goguen's miniature cloth flag constituted "the flag of the United States . . . ." Goguen argued unsuccessfully before the state courts that the statute applied only to flags that met "official standards" for proportions, such as relation of height to width and the size of stripes and the field of stars, and that the cloth he wore did not meet those standards. Tr. of Oral Arg. 11–12, 24–26; App. 2. There was no dispute that Goguen's adornment had the requisite number of stars and stripes and colors. Tr. of Oral Arg. 11–12. The Massachusetts Supreme Judicial Court found Goguen's cloth flag to be covered by the statute, noting that "[t]he statute does not require that the flag be 'official,'" *Commonwealth* v. *Goguen*, — Mass., at —, 279 N. E. 2d, at 668. The lower federal courts did not address this holding, nor do we. We note only that the Massachusetts Legislature apparently sensed an ambiguity in this respect, because subsequent to Goguen's prosecution it amended the statute in an effort to define what it had meant by the "flag of the United States." See n. 3, *supra*.

interpretation in this case.[25] Appellant further argues that the Supreme Judicial Court in Goguen's case has restricted the scope of the statute to intentional contempt.[26] Aside from the problems presented by an appellate court's limiting construction in the very case in which a defendant has been tried under a previously unnarrowed statute,[27] this holding still does not clarify what conduct constitutes contempt, whether intentional or inadvertent.

Finally, appellant argues that state law enforcement authorities have shown themselves ready to interpret this penal statute narrowly and that the statute, properly read, reaches only direct, immediate contemptuous acts that "actually impinge upon the physical integrity of the flag . . . ."[28] There is no support in the record for the former point.[29] Similarly, nothing in the state

[25] Tr. of Oral Arg. 48.

[26] The Massachusetts court commented simply that "[t]he jury could infer that the violation was intentional without reviewing any words of the defendant." *Commonwealth* v. *Goguen*, *supra*, at —, 279 N. E. 2d, at 668. Thus, the court held that the jury could infer intent merely from Goguen's conduct. This is apparently also a holding that the jury *must* find contemptuous intent under the statute, although the requirement amounts to very little since it is so easily satisfied. The court's reference to verbal communication reflected Goguen's reliance on *Street* v. *New York*, 394 U. S. 576 (1969).

[27] *E. g.*, *Ashton* v. *Kentucky*, 384 U. S. 195, 198 (1966).

[28] Brief for Appellant 22.

[29] With regard to prosecutorial policies, appellant cites two published opinions of the Massachusetts Attorney General. 4 Op. Atty. Gen. 470–473 (1915) (reproduced in Brief for Appellant 30); Report of Atty. Gen., Pub. Doc. No. 12, p. 192 (1968) (reproduced in Jurisdictional Statement App. 53). Appellant concedes that neither deals with the contempt portion of the statute under which Goguen was convicted. Thus, they are not in point here. They provided guidance to no one on the relevant statutory language. Nevertheless, appellant is correct that they show a tendency on the

court's opinion in this case or in any earlier opinion of that court sustains the latter. In any event, Goguen was charged only under the wholly open-ended language of publicly treating the flag "contemptuously." There was no allegation of physical desecration.

There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order. Cf. *Colten* v. *Kentucky*, 407 U. S. 104 (1972). But there is no comparable reason for committing broad discretion to law enforcement officials in the area of flag contempt. Indeed, because display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw. Certainly nothing prevents a legislature from defining with substantial specificity what

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part of the State Attorney General to read other portions of the statute narrowly. At the same time, they reflect the lack of precision recurring throughout the Massachusetts flag-misuse statute. The 1915 opinion noted that a literal reading of one portion of the statute, prohibiting exhibition of engravings of the flag on certain articles, would make it a criminal offense to display the flag itself "in many of its cheaper and more common forms." Brief for Appellant 31–32. The State Attorney General concluded that this would be a "manifest absurdity." *Id.*, at 32. The 1968 opinion advised that a flag representation painted on a door was not "a flag of the United States" within the meaning of the statute. Jurisdictional Statement App. 53–55. A contrary interpretation would "raise serious questions under the First and Fourteenth Amendments . . . ," given the requirement that behavior made criminal must be "plainly prohibited by the language of the statute." *Id.*, at 54.

constitutes forbidden treatment of United States flags.[20] The statutory language at issue here fails to approach that goal and is void for vagueness.[21] The judgment is affirmed.[22]

It is so ordered.

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[20] The federal flag desecration statute, for example, reflects a congressional purpose to do just that. In response to a warning by the United States Attorney General that to use such unbounded terms as "defies" or "casts contempt . . . either by word or act" is "to risk invalidation" on vagueness grounds, S. Rep. No. 1287, 90th Cong., 1st Sess., 5 (1968); H. R. Rep. No. 350, 90th Cong., 1st Sess., 7 (1967), the bill which became the federal statute was amended, 113 Cong. Rec. 16449, 16450 (1967), to reach only acts that physically damage the flag. The desecration provision of the statute, 18 U. S. C. § 700 (a), declares:

"(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

The legislative history reveals a clear desire to reach only defined physical acts of desecration. ("The language of the bill prohibits intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag.") H. R. Rep. No. 350, *supra*, at 3; S. Rep. No. 1287, *supra*, at 3. The act has been so read by the lower federal courts, which have upheld it against vagueness challenges. *United States* v. *Crosson*, 462 F. 2d 96 (CA9) cert. denied, 409 U. S. 1064 (1972); *Joyce* v. *United States*, 147 U. S. App. D. C. 128, 454 F. 2d 971 (1971), cert. denied, 405 U. S. 969 (1972). See *Hoffman* v. *United States*, 144 U. S. App. D. C. 156, 445 F. 2d 226 (1971).

[21] We are aware, of course, of the universal adoption of flag desecration or contempt statutes by the Federal and State Governments. See n. 30, *supra*. The statutes of the 50 States are synopsised in Hearings on H. R. 271 et al., before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 1st Sess., ser. 4, pp. 324–346 (1967). Most of the state statutes are patterned after the Uniform Flag Law of 1917, which in § 3 provides that:

"No person shall publicly mutilate, deface, defile, defy, trample

[*Footnote 32 is on p. 583*]

MR. JUSTICE WHITE, concurring in the judgment.

It is a crime in Massachusetts if one mutilates, tramples, defaces or "treats contemptuously" the flag of the United States. Appellee Goguen was convicted of treating the flag contemptuously, the evidence being that he wore a likeness of the flag on the seat of his pants. The Court holds this portion of the statute too vague to provide an ascertainable standard of guilt in any situation, including this one. Although I concur in the judgment of affirmance for other reasons, I cannot agree with this rationale.[1]

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upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

Compare 9B Uniform Laws Ann. 52–53 (1966), with Hearings on H. R. 271 et al., *supra*, at 321–346. Because it is stated in the disjunctive, this language, like that before us, makes possible criminal prosecution solely for casting contempt upon the flag. But the validity of statutes utilizing this language, insofar as the vagueness doctrine is concerned, will depend as much on their judicial construction and enforcement history as their literal terms.

[2] We have not addressed Goguen's First Amendment arguments because, having found the challenged statutory language void for vagueness, there is no need to decide additional issues. Moreover, the skeletal record in this case, see n. 1, *supra*, affords a poor opportunity for the careful consideration merited by the importance of the First Amendment issues Goguen has raised.

[1] There has been recurring litigation, with diverse results, over the validity of flag use and flag desecration statutes. Representative of the federal and state cases are the following: *Thoms* v. *Heffernan*, 473 F. 2d 478 (CA2 1973); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F. 2d 344 (CA2 1970); *United States* v. *Crosson*, 462 F. 2d 96 (CA9), cert. denied, 409 U. S. 1064 (1972); *Joyce* v. *United States*, 147 U. S. App. D. C. 128, 454 F. 2d 971 (1971), cert. denied, 405 U. S. 969 (1972); *Deeds* v. *Beto*, 353 F. Supp. 840 (ND Tex. 1973); *Oldroyd* v. *Kugler*, 327 F. Supp. 176 (NJ 1970), rev'd, 461 F. 2d 535 (CA3 1972), abstention on remand, 352 F. Supp. 27, aff'd, 412 U. S. 924 (1973); *Sutherland* v. *DeWulf*, 323 F. Supp. 740 (SD Ill. 1971); *Parker* v. *Morgan*, 322

I

It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is contemptuous conduct and that would be covered by the statute if directed at the flag. In these instances, there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed contemptuous by the State, but unpredictability in those situations does not change the certainty in others.

I am also confident that the statute was not vague with respect to the conduct for which Goguen was arrested and convicted. It should not be beyond the reasonable comprehension of anyone who would conform his conduct to the law to realize that sewing a flag on the seat of his pants is contemptuous of the flag. The

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F. Supp. 585 (WDNC 1971); *Crosson* v. *Silver*, 319 F. Supp. 1084 (Ariz. 1970); *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (Del. 1970), rev'd on other grounds *sub nom. Hodsdon* v. *Stabler*, 444 F. 2d 533 (CA3 1971); *United States* v. *Ferguson*, 302 F. Supp. 1111 (ND Cal. 1969); *State* v. *Royal*, 113 N. H. 224, 305 A. 2d 676 (1973); *State* v. *Zimmelman*, 62 N. J. 279, 301 A. 2d 129 (1973); *State* v. *Spence*, 81 Wash. 2d 788, 506 P. 2d 293, probable jurisdiction noted, 414 U. S. 815 (1973) (*sub judice*); *City of Miami* v. *Wolfenberger*, 265 So. 2d 732 (Fla. Dist. Ct. App. 1972); *State* v. *Mitchell*, 32 Ohio App. 2d 16, 288 N. E. 2d 216 (1972); *State* v. *Liska*, 32 Ohio App. 2d 317, 291 N. E. 2d 498 (1971); *State* v. *Van Camp*, 6 Conn. Cir. 609, 281 A. 2d 584 (1971); *State* v. *Waterman*, 190 N. W. 2d 809 (Iowa 1971); *State* v. *Saulino*, 29 Ohio Misc. 25, 277 N. E. 2d 580 (1971); *Deeds* v. *State*, 474 S. W. 2d 718 (Crim. App. Tex. 1971); *People* v. *Radich*, 26 N. Y. 2d 114, 257 N. E. 2d 30 (1970), aff'd by an equally divided court, 401 U. S. 531, rehearing denied, 402 U. S. 989 (1971); *People* v. *Cowgill*, 274 Cal. App. 2d 923, 78 Cal. Rptr. 853 (1969), appeal dismissed, 396 U. S. 371 (1970); *Hinton* v. *State*, 223 Ga. 174, 154 S. E. 2d 246 (1967), rev'd on other grounds *sub nom. Anderson* v. *Georgia*, 390 U. S. 206 (1968).

Supreme Judicial Court of Massachusetts, in affirming the conviction, stated that the "jury could infer that the violation was intentional . . . ." If he thus intended the very act which the statute forbids, Goguen can hardly complain that he did not realize his acts were in violation of the statute. "[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . [W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Screws* v. *United States*, 325 U. S. 91, 101–102 (1945).

If it be argued that the statute in this case merely requires an intentional act, not a willful one in the sense of intending what the statute forbids, then it must be recalled that appellee's major argument is that wearing a flag patch on his trousers was conduct that "clearly expressed an idea, albeit unpopular or unpatriotic, about the flag or about the country it symbolizes . . . . Goguen may have meant to show that he believed that America was a fit place only to sit on, or the proximity to that portion of his anatomy might have had more vulgar connotations. Nonetheless, the strong and forceful communication of ideas is unmistakable." App. 13. Goguen was under no misapprehension as to what he was doing and as to whether he was showing contempt for the flag of the United States. As he acknowledges in his brief here, "it was necessary for the jury to find that appellee conveyed a contemptuous attitude in order to convict him." I cannot, therefore, agree that the Massachusetts statute is vague as to Goguen; and if not vague as to his conduct, it is irrelevant that it may be vague in other contexts with respect to other

conduct. "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 33 (1963). Statutes are not "invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *Id.*, at 32.

The unavoidable inquiry, therefore, becomes whether the "treats contemptuously" provision of the statute, as applied in this case, is unconstitutional under the First Amendment. That amendment, of course, applies to speech and not to conduct without substantial communicative intent and impact. Even though particular conduct may be expressive and is understood to be of this nature, it may be prohibited if necessary to further a nonspeech interest of the Government that is within the power of the Government to implement. *United States* v. *O'Brien*, 391 U. S. 367 (1968).

There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well, surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat. 341, c. 1, just as they had for the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777). It is a fact of history that flags have been associated with nations and with government at all levels,

as well as with tribes and families. It is also a historical fact that flags, including ours, have played an important and useful role in human affairs. One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition. The United States has created its own flag, as it may. The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence. Neither would I find it beyond congressional power, or that of state legislatures, to forbid attaching to or putting on the flag any words, symbols, or advertisements.[2] All of these objects, whatever their nature, are foreign to the flag, change its physical character, and interfere with its design and function. There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.

II

I would affirm Goguen's conviction, therefore, had he been convicted for mutilating, trampling upon, or defacing the flag, or for using the flag as a billboard for

[2] For a treatment of statutes protective of the flag, see Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash. U. L. Q. 193.

commercial advertisements or other displays. The Massachusetts statute, however, does not stop with proscriptions against defacement or attaching foreign objects to the flag. It also makes it a crime if one "treats contemptuously" the flag of the United States, and Goguen was convicted under this part of the statute. To violate the statute in this respect, it is not enough that one "treat" the flag; he must also treat it "contemptuously," which, in ordinary understanding, is the expression of contempt for the flag. In the case before us, as has been noted, the jury must have found that Goguen not only wore the flag on the seat of his pants but also that the act—and hence Goguen himself—was contemptuous of the flag. To convict on this basis is to convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.[2]

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[2] Massachusetts has not construed its statute to eliminate the communicative aspect of the proscribed conduct as a crucial element of the violation. In *State* v. *Royal*, 113 N. H. 224, 305 A. 2d 676 (1973), the New Hampshire Supreme Court, noting among other things that the State has a valid interest in the physical integrity of the flag, rejected a facial attack on its flag desecration statute, which made it a crime to publicly mutilate, trample upon, defile, deface, or cast contempt upon the flag. The court construed its statute to be "directed at acts upon the flag and not 'at the expression of and mere belief in particular ideas.'" *Id.*, at 230, 305 A. 2d, at 680. The proscription against casting contempt upon the flag was to be understood as a general prohibition of acts of the same nature as the previously forbidden acts of mutilation and defacement, not as a proscription of the expression of ideas. Thus:

"Our statute is more narrowly drawn than some flag statutes. It deals only with the flag itself or any 'flag or ensign evidently purporting to be' the flag. *State* v. *Cline*, [113 N. H. 245], 305 A. 2d 673, decided this date. Also, as we construe it, our statute prohibits only acts of mutilation and defilement inflicted directly upon the flag

Neither the United States nor any State may require any individual to salute or express favorable attitudes toward the flag. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943). It is also clear under our cases that disrespectful or contemptuous spoken or written words about the flag may not be punished consistently with the First Amendment. *Street* v. *New York*, 394 U. S. 576 (1969). Although neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment, *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969), and may not be forbidden by law except when incidental to preventing unprotected conduct or unless the communication is itself among those that fall outside the protection of the First Amendment. In *O'Brien*, *supra*, the Court sustained a conviction for draft card burning, although admittedly the burning was itself expressive. There, destruction of draft cards, whether communicative or not, was found to be inimical to important governmental considerations. But the Court made clear that if the concern of the law was with the expression associated with the act, the result would be otherwise:

"The case at bar is therefore unlike one where the alleged governmental interest in regulating con-

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itself and does not prohibit acts which are directed at the flag without touching it. The statute enumerates specific acts of flag desecration, namely 'mutilate, trample upon, defile, deface,' all of which involve physical acts upon the flag. The general term 'cast contempt' follows these enumerated specific acts. We hold that the phrase 'or cast contempt by . . . acts' as used in RSA 573:4 is limited to physical abuse type of acts similar to those previously enumerated in the statute. 2 Sutherland, Statutory Construction § 4909 (3d rev. ed. Horack 1943); *State* v. *Small*, 99 N. H. 349, 111 A. 2d 201 (1955); *State* v. *N. H. Gas & Electric Co.*, 86 N. H. 16, 163 A. 724 (1932)." *Id.*, at 227, 305 A. 2d, at 679.

duct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California*, 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." 391 U. S., at 382.

It would be difficult, therefore, to believe that the conviction in *O'Brien* would have been sustained had the statute proscribed only contemptuous burning of draft cards.

Any conviction under the "treats contemptuously" provision of the Massachusetts statute would suffer from the same infirmity. This is true of Goguen's conviction. And if it be said that the conviction does not violate the First and Fourteenth Amendments because Goguen communicated nothing at all by his conduct and did not intend to do so, there would then be no evidentiary basis whatsoever for convicting him of being "contemptuous" of the flag. I concur in the Court's judgment.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with MR. JUSTICE WHITE in his conclusion that the Massachusetts flag statute is not unconstitutionally vague. I disagree with his conclusion that the words "treats contemptuously" are necessarily directed at protected speech and that Goguen's conviction for his immature antic therefore cannot withstand constitutional challenge.

I agree with MR. JUSTICE REHNQUIST when he concludes that the First Amendment affords no shield to Goguen's conduct. I reach that result, however, not on the ground that the Supreme Judicial Court of Massachusetts "would read" the language of the Massachusetts statute to require that "treats contemptuously" entails physical contact with the flag and the protection of its physical integrity, but on the ground that that court, by its unanimous rescript opinion, has in fact already done exactly that. The court's opinion states that Goguen "was not prosecuted for being 'intellectually . . . diverse' or for 'speech,' as in Street v. New York, 394 U. S. 576, 593–594 . . . ." Having rejected the vagueness challenge and concluded that Goguen was not punished for speech, the Massachusetts court, in upholding the conviction, has necessarily limited the scope of the statute to protecting the physical integrity of the flag. The requisite for "treating contemptuously" was found and the court concluded that punishment was not for speech—a communicative element. I, therefore, must conclude that Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants. I accept the Massachusetts court's opinion at what I regard to be its face value.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the concurring opinion of my Brother WHITE insofar as he concludes that the Massachusetts law is not unconstitutionally vague, but I do not agree with him that the law under which appellee Goguen was convicted violates the First and Fourteenth Amendments. The issue of the application of the First Amendment to expressive conduct, or "symbolic speech," is

undoubtedly a difficult one, and in cases dealing with the United States flag it has unfortunately been expounded only in dissents and concurrences. See *Street* v. *New York*, 394 U. S. 576, 594 (1969) (Warren, C. J., dissenting), 609 (Black, J., dissenting), 610 (WHITE, J., dissenting), 615 (Fortas, J., dissenting); and *Cowgill* v. *California*, 396 U. S. 371 (1970) (Harlan, J., concurring). Nonetheless, since I disagree with the Court's conclusion that the statute is unconstitutionally vague, I must, unlike the Court, address appellant's First Amendment contentions.

The question whether the State may regulate the display of the flag in the circumstances shown by this record appears to be an open one under our decisions. *Halter* v. *Nebraska*, 205 U. S. 34 (1907); *Street* v. *New York*, *supra*; *Cowgill* v. *California*, *supra* (Harlan, J., concurring); *People* v. *Radich*, 26 N. Y. 2d 114, 257 N. E. 2d 30, aff'd by an equally divided Court, 401 U. S. 531 (1971).

What the Court rightly describes as "the slender record in this case," *ante*, at 568, shows only that Goguen wore a small cloth version of the United States flag sewn to the seat of his blue jeans. When the first police officer questioned him, he was standing with a group of people on Main Street in Leominster, Massachusetts. The people with him were laughing. When the second police officer saw him, he was "walking in the downtown business district of Leominster, wearing a short coat, casual type pants and a miniature American flag sewn on the left side of his pants." Goguen did not testify, and there is nothing in the record before us to indicate what he was attempting to communicate by his conduct, or, indeed, whether he was attempting to communicate anything at all. The record before us does not even conclusively reveal whether Goguen sewed the flag on the

pants himself, or whether the pants were manufactured complete with flag; his counsel here, however, who was also his trial counsel, stated in oral argument that of his own knowledge the pants were not manufactured with the flag on them. Finally, it does not appear whether appellee said anything during his journey through the streets of Leominster; his amended bill of exceptions to the Supreme Judicial Court of Massachusetts made no mention of any testimony indicating that he spoke at all.

Goguen was prosecuted under the Massachusetts statute set forth in the opinion of the Court, and has asserted here not only a claim of unconstitutional vagueness but a claim that the statute infringes his right under the First and Fourteenth Amendments.

I

There is a good deal of doubt on this record that Goguen was trying to communicate any particular idea, and had he been convicted under a statute which simply prohibited improper display of the flag I would be satisfied to conclude that his conduct in wearing the flag on the seat of his pants did not come within even the outermost limits of that sort of "expressive conduct" or "symbolic speech" which is entitled to any First Amendment protection. But Goguen was convicted of treating the flag contemptuously by the act of wearing it where he did, and I have difficulty seeing how Goguen could be found by a jury to have treated the flag contemptuously by his act and still not to have expressed any idea at all. There are, therefore, in my opinion, at least marginal elements of "symbolic speech" in Goguen's conduct as reflected by this record.

Many cases which could be said to involve conduct no less expressive than Goguen's, however, have never been thought to require analysis in First Amendment

terms because of the presence of other factors. One who burns down the factory of a company whose products he dislikes can expect his First Amendment defense to a consequent arson prosecution to be given short shrift by the courts. The arson statute safeguards the government's substantial interest in preventing the destruction of property by means dangerous to human life, and an arsonist's motive is quite irrelevant. The same fate would doubtless await the First Amendment claim of one prosecuted for destruction of government property after he defaced a speed limit sign in order to protest the stated speed limit. Both the arsonist and the defacer of traffic signs have infringed on the property interests of others, whether of another individual or of the government. Yet Goguen, unlike either, has so far as this record shows infringed on the ordinary property rights of no one.

That Goguen owned the flag with which he adorned himself, however, is not dispositive of the First Amendment issue. Just as the government may not escape the reach of the First Amendment by asserting that it acts only in a proprietary capacity with respect to streets and parks to which it has title, *Hague* v. *CIO*, 307 U. S. 496, 514–516 (1939), a defendant such as Goguen may not escape the reach of the police power of the State of Massachusetts by asserting that his act affected only his own property. Indeed, there are so many well-established exceptions to the proposition that one may do what he likes with his own property that it cannot be said to have even the status of a general rule.

The very substantial authority of state and local governing bodies to regulate the use of land, and thereby to limit the uses available to the owner of the land, was established nearly a half century ago in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). Land-use regulations

in a residential zoning district typically do not merely exclude malodorous and unsightly rendering plants; they often also prohibit erection of buildings or monuments, including ones open to the public, which might itself in an aesthetic sense involve substantial elements of "expressive conduct." The performance of a play may well constitute expressive conduct or "pure" speech, but a landowner may not for that reason insist on the right to construct and operate a theater in an area zoned for noncommercial uses. So long as the zoning laws do not, under the guise of neutrality, actually prohibit the expression of ideas because of their content, they have not been thought open to challenge under the First Amendment.

As may land, so may other kinds of property be subjected to close regulation and control. A person with an ownership interest in controlled drugs, or in firearms, cannot use them, sell them, and transfer them in whatever manner he pleases. The copyright laws, 17 U. S. C. § 1 *et seq.*, limit what use the purchaser of a copyrighted book may make of his acquisition. A company may be restricted in what it advertises on its billboards, *Packer Corp.* v. *Utah*, 285 U. S. 105 (1932).

The statute which Goguen violated, however, does not purport to protect the related interests of other property owners, neighbors, or indeed any competing ownership interest in the same property; the interest which it protects is that of the Government, and is not a traditional property interest.

Even in this, however, laws regulating use of the flag are by no means unique. A number of examples can be found of statutes enacted by Congress which protect only a peculiarly governmental interest in property otherwise privately owned. Title 18 U. S. C. § 504 prohibits the printing or publishing in actual size or in actual

color of any United States postage or revenue stamp, or of any obligation or security of the United States. It likewise prohibits the importation of any plates for the purpose of such printing. Title 18 U. S. C. § 331 prohibits the alteration of any Federal Reserve note or national bank note, and 18 U. S. C. § 333 prohibits the disfiguring or defacing of any national bank note or coin. Title 18 U. S. C. § 702 prohibits the wearing of a military uniform, any part of such uniform, or anything similar to a military uniform or part thereof without proper authorization. Title 18 U. S. C. § 704 prohibits the unauthorized wearing of service medals. It is not without significance that many of these statutes, though long on the books, have never been judicially construed or even challenged.

My Brother WHITE says, however, that whatever may be said of neutral statutes simply designed to protect a governmental interest in private property, which in the case of the flag may be characterized as an interest in preserving its physical integrity, the Massachusetts statute here is not neutral. It punishes only those who treat the flag contemptuously, imposing no penalty on those who "treat" it otherwise, that is, those who impair its physical integrity in some other way.

II

Leaving aside for the moment the nature of the governmental interest in protecting the physical integrity of the flag, I cannot accept the conclusion that the Massachusetts statute must be invalidated for punishing only some conduct that impairs the flag's physical integrity. It is true, as the Court observes, that we do not have in so many words a "narrowing construction" of the statute from the Supreme Judicial Court of Massachusetts. But the first of this Court's decisions cited in the short

rescript opinion of the Supreme Judicial Court is *Halter* v. *Nebraska*, 205 U. S. 34 (1907), which upheld against constitutional attack a Nebraska statute which forbade the use of the United States flag for purposes of advertising. We also have the benefit of an opinion of the Attorney General of the Commonwealth of Massachusetts that the statute under which Goguen was prosecuted, being penal, "'is not to be enlarged beyond its plain import, and as a general rule is strictly construed.'" Report of Atty. Gen., Pub. Doc. No. 12, pp. 192–193 (1968). With this guidance, and the further assistance of the content of the entire statutory prohibition, I think the Supreme Judicial Court would read the language "whoever publicly mutilates, tramples upon, defaces, or treats contemptuously the flag of the United States . . ." as carrying the clear implication that the contemptuous treatment, like mutilation, trampling upon, or defacing, must involve some actual physical contact with the flag itself. Such a reading would exclude a merely derogatory gesture performed at a distance from the flag, as well as purely verbal disparagement of it.*

If the statute is thus limited to acts which affect the physical integrity of the flag, the question remains whether the State has sought only to punish those who impair the flag's physical integrity for the purpose of disparaging it as a symbol, while permitting impairment

*To the extent that counsel for appellant who argued the cause in the Court of Appeals may have intimated a broader construction in the colloquy in that court quoted in this Court's opinion, *ante*, at 575–576. I would attach little weight to it. We have previously said that we are "loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument," *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 170 (1972), and if that be the case surely even less weight should be ascribed by us to a colloquy which took place in another court.

of its physical integrity by those who do not seek to disparage it as a symbol. If that were the case, holdings like *Schacht* v. *United States*, 398 U. S. 58 (1970), suggest that such a law would abridge the right of free expression.

But Massachusetts metes out punishment to anyone who publicly mutilates, tramples, or defaces the flag, regardless of his motive or purpose. It also punishes the display of any "words, figures, advertisements or designs" on the flag, or the use of a flag in a parade as a receptacle for depositing or collecting money. Likewise prohibited is the offering or selling of any article on which is engraved a representation of the United States flag.

The variety of these prohibitions demonstrates that Massachusetts has not merely prohibited impairment of the physical integrity of the flag by those who would cast contempt upon it, but equally by those who would seek to take advantage of its favorable image in order to facilitate any commercial purpose, or those who would seek to convey any message at all by means of imprinting words or designs on the flag. These prohibitions are broad enough that it can be fairly said that the Massachusetts statute is one essentially designed to preserve the physical integrity of the flag, and not merely to punish those who would infringe that integrity for the purpose of disparaging the flag as a symbol. While it is true that the statute does not appear to cover one who simply wears a flag, unless his conduct for other reasons falls within its prohibitions, the legislature is not required to address every related matter in an area with one statute. *Katzenbach* v. *Morgan*, 384 U. S. 641, 656–658 (1966). It may well be that the incidence of such conduct at the time the statute was enacted was not thought to warrant legislation in order to preserve the physical integrity of the flag.

In *United States* v. *O'Brien*, 391 U. S. 367 (1968), the Court observed:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.*, at 376.

Then, proceeding "on the assumption that the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment," the Court held that a regulation of conduct was sufficiently justified

> "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.

While I have some doubt that the first enunciation of a group of tests such as those established in *O'Brien* sets them in concrete for all time, it does seem to me that the Massachusetts statute substantially complies with those tests. There can be no question that a statute such as the Massachusetts one here is "within" the constitutional power of a State to enact. Since the statute by this reading punishes a variety of uses of the flag which would impair its physical integrity, without regard to presence or character of expressive conduct in connection with those uses, I think the governmental interest is unrelated to the suppression of free expression. The question of whether the governmental interest is "substantial" is not easy to sever from the question of whether the restriction is "no greater than is essential to the furtherance of that interest," and I therefore treat those

two aspects of the matter together. I believe that both of these tests are met, and that the governmental interest is sufficient to outweigh whatever collateral suppression of expressive conduct was involved in the actions of Goguen. In so concluding, I find myself in agreement not only with my Brother WHITE in this case, but with those members of the Court referred to earlier in this opinion who dissented from the Court's disposition in the case of *Street* v. *New York*, 394 U. S. 576 (1969).

My Brother WHITE alludes to the early legislation of both the Continental Congress and of the Congress of the new Nation dealing with the flags, and observes, "One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition." I agree.

On September 17, 1787, as the last members of the Constitutional Convention were signing the instrument, James Madison in his "Notes" describes the occurrence of the following incident:

> "Whilst the last members were signing it Doctor Franklin looking towards the President's Chair, at the back of which a rising sun happened to be painted, observed to a few members near him, that Painters had found it difficult to distinguish in their art a rising from a setting sun. I have said he, often and often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting: But now at length I have the happiness to know that it is a rising and not a setting sun." 4 Writings of James Madison 482–483 (Hunt ed. 1903).

Writing for this Court more than one hundred years later, Mr. Justice Holmes made the familiar statement:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland*, 252 U. S. 416, 433 (1920).

From its earliest days, the art and literature of our country have assigned a special place to the flag of the United States. It figures prominently in at least one of Charles Willson Peale's portraits of George Washington, showing him as leader of the forces of the 13 Colonies during the Revolutionary War. No one who lived through the Second World War in this country can forget the impact of the photographs of the members of the United States Marine Corps raising the United States flag on the top of Mount Suribachi on the Island of Iwo Jima, which is now commemorated in a statue at the Iwo Jima Memorial adjoining Arlington National Cemetery.

Ralph Waldo Emerson, writing 50 years after the battles of Lexington and Concord, wrote:

> "By the rude bridge that arched the flood
> Their flag to April's breeze unfurled
> Here once the embattled farmers stood
> And fired the shot heard 'round the world."

Oliver Wendell Holmes, Senior, celebrated the flag that had flown on "Old Ironsides" during the War of 1812, and John Greenleaf Whittier made Barbara Frietchie's devotion to the "silken scarf" in the teeth of Stonewall Jackson's ominous threats the central theme of his familiar poem. John Philip Sousa's "Stars and Stripes Forever" and George M. Cohan's "It's a Grand Old Flag" are musical celebrations of the flag familiar to adults and children alike. Francis Scott Key's "Star Spangled Banner" is the country's national anthem.

While most of the artistic evocations of the flag occur in the context of times of national struggle, and correspondingly greater dependence on the flag as a symbol of national unity, the importance of the flag is by no means limited to the field of hostilities. The United States flag flies over every federal courthouse in our Nation, and is prominently displayed in almost every federal, state, or local public building throughout the land. It is the one visible embodiment of the authority of the National Government, through which the laws of the Nation and the guarantees of the Constitution are enforced.

It is not empty rhetoric to say that the United States Constitution, even the First and Fourteenth Amendments under which Goguen seeks to upset his conviction, does not invariably in the world of practical affairs enforce itself. Going back no further than the memories of most of us presently alive, the United States flag was carried by federal troops summoned by the President to enforce decrees of federal courts in Little Rock, Arkansas, in 1957, and in Oxford, Mississippi, in 1962.

The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion. But if the Government

may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not, for all of the reasons mentioned, create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood—a history compiled by generations of our forebears and contributed to by streams of immigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen . . . by the most gifted of its begetters."

The permissible scope of government regulation of this unique physical object cannot be adequately dealt with in terms of the law of private property or by a highly abstract, scholastic interpretation of the First Amendment. Massachusetts has not prohibited Goguen from wearing a sign sewn to the seat of his pants expressing in words his low opinion of the flag, of the country, or anything else. It has prohibited him from wearing there a particular symbol of extraordinary significance and content, for which significance and content Goguen is in no wise responsible. The flag of the United States is not just another "thing," and it is not just another "idea"; it is not primarily an idea at all.

Here Goguen was, so far as this record appears, quite free to express verbally whatever views it was he was seeking to express by wearing a flag sewn to his pants, on the streets of Leominster or in any of its parks or commons where free speech and assembly were customarily permitted. He was not compelled in any way to salute the flag, pledge allegiance to it, or make any

affirmative gesture of support or respect for it such as would contravene *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943). He was simply prohibited from impairing the physical integrity of a unique national symbol which has been given content by generations of his and our forebears, a symbol of which he had acquired a copy. I believe Massachusetts had a right to enact this prohibition.

